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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 353.

THE UNITED STATES, APPELLANT,

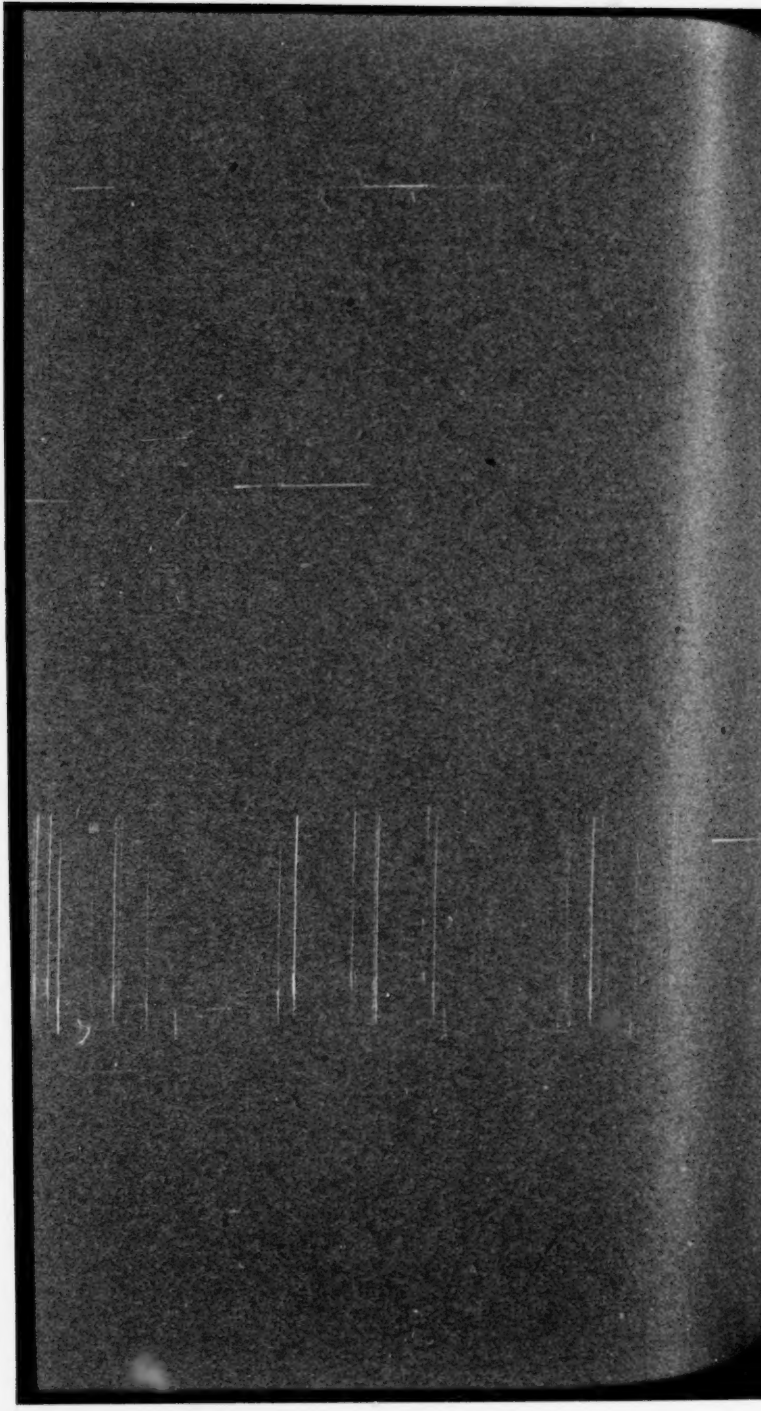
v.

WILLIAM EDMONSTON.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 30, 1900.

(17,982.)



29422

SUPREME COURT OF THE UNITED STATES.

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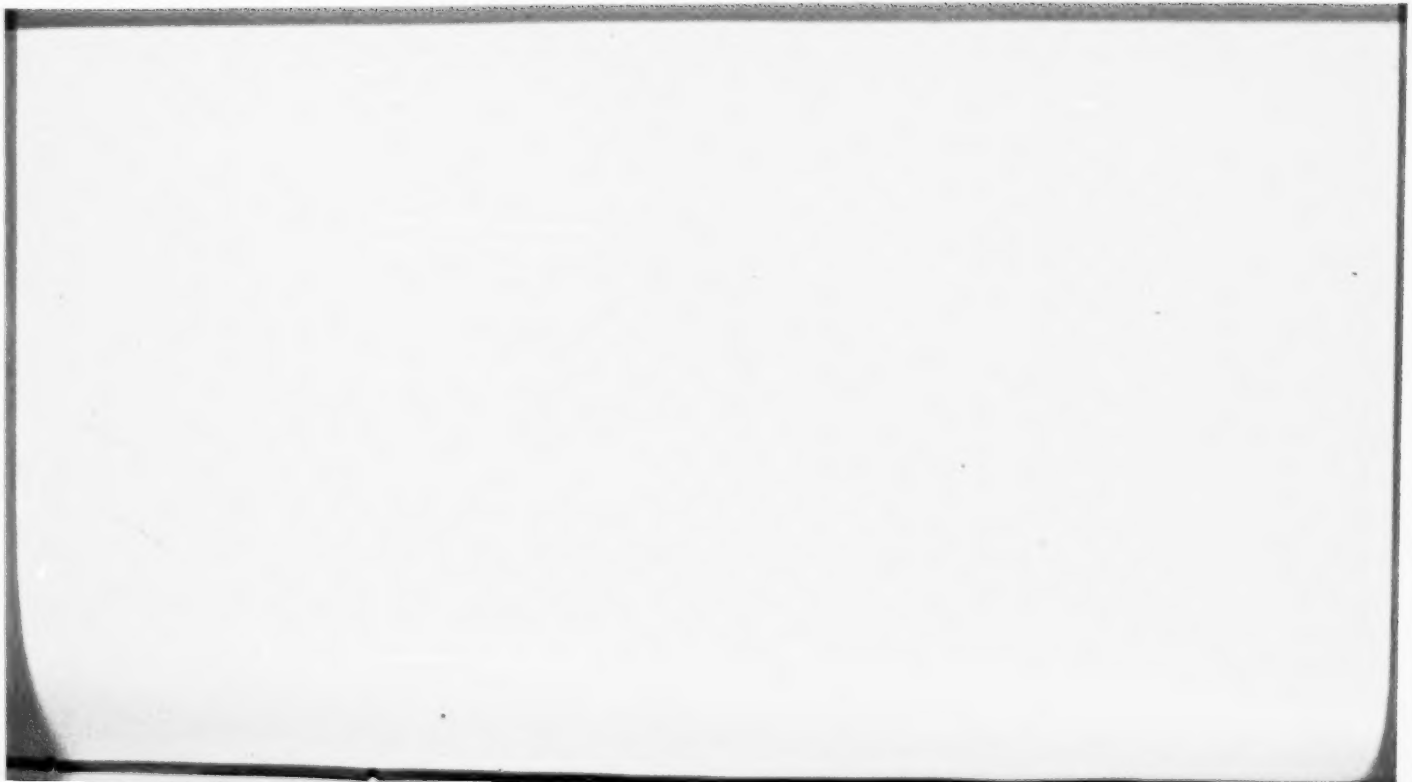
v.

WILLIAM EDMONSTON.

APPEAL FROM THE COURT OF CLAIMS.

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1 I.

Petition filed August 8, 1894.

In the Court of Claims, December term, 1893.

WILLIAM EDMONSTON AND OTHERS
v.
THE UNITED STATES. } No. 18556.

Petition.

The petition of the hereinafter-named claimants states that each of them is a citizen of the United States; that in the year hereinafter mentioned each of the claimants entered a tract of land at the Ashland land office, containing the number of acres hereinafter set forth, under the preemption or commutation provisions of the homestead laws, and that each of the said claimants was required by the register and receiver of the said land office and their superiors in office to pay, and that each of the said claimants did pay, under the compulsion of the said officers, the sum of $2.50 per acre for the land contained in his said entry.

The petition further states that the tract entered was subject to entry on the 15th day of June, 1880, and had been raised in price to $2.50 per acre, and put in the market at that price, on the 24th day of June, 1859, by reason of the grant of alternate sections for railroad purposes, and was reduced in price to one dollar and twenty-five cents per acre by the act of June 15, 1880 (21 Stat. L., 237), and was subject to entry by the claimant at the time entered upon payment of the said sum of $1.25 per acre.

The petition further states that the said receiver turned over to the defendant as part of the receipts of his said office the said sum of $2.50 per acre paid him by each of the claimants, and that the defend-
2 ant now retains and withholds and has not repaid the sum of $1.25 per acre belonging to the claimants, contrary to equity and good conscience. Wherefore each of the claimants prays judgment against the defendant in the sum hereinafter mentioned.

JAMES H. SPALDING,
EDWIN W. SPALDING,
Attorneys for the Claimants.

Name of claimant.	Number of acres entered.	Year of entry and amount for which judgment is asked.	
William Edmonston	160	1891	$200
William Edmonston	155.38	1891	194.22
Robert C. Hanna, admr. of Dan. Kennedy, dec'd	160	1889	200
Edward Brown	160	1890	200
Manus Brown	160	1890	200
Peter P. Colgoard	160	1891	200
Kate Wood	160	1889	200
Charles B. Bradford	160.58	1890	200.72
Swan Swanberg	80	1891	100
Jacob Fraseth	80	1893	100
John Spaulding	80	1891	100
Fred M. Milligan	40	1890	50
Samuel Peterson	40	Oct., 88	50

COUNTY OF WASHINGTON,
District of Columbia, ss:

Edwin W. Spalding, of said county, having been duly sworn, deposes and says that he is one of the attorneys for the above-named claimants; that no assignment of said claim or of any interest therein or part thereof has been made except as stated in the said petition; that the claimants are justly entitled to the amounts therein claimed from the United States, as deponent verily believes, exclusive of all offsets and just grounds of defense, and that the facts stated in the said petition are true.

EDWIN W. SPALDING,
Attorney for the Claimant.

Sworn to and subscribed before me this 8th day of August, 1894.
[SEAL.]

FRANK B. MARLOW,
Notary Public.

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II.

Traverse, filed June 4, 1900.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant have at all times borne true faith and allegiance to the Government of the United States, and ha not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney-General.

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III.

Findings of fact and conclusions of law, filed June 4, 1900.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, at the land office at Ashland, Wisconsin, on March 11, 1891, filed his declaratory statement under the preemption laws No. 2174, declaring his intention to preempt the S. ½, S. E. ¼, and S. ½ of S. W. ¼ of sec. No. 12, in T. No. 44 N. of R. No. 13 W., which declaration was to expire on March 2, 1892; and on September 16, 1891, at the said land office the said declarant gave public notice by public advertisement, as required by law, of his intention to make final proof at the said land office on November 9, 1891, to establish his claim and right to the land described, and on November 9, 1891, by various witnesses, the claimant satisfied the register and receiver at the said land office that from about March 2, 1891, he had inhabited and improved the said land and had built a dwelling thereon.

II.

The claimant having established his right to the said land on November 11, 1891, was required to pay for the same to the United States the sum of $400, being at the rate of $2.50 per acre for 160 acres, and he did pay the United States that amount for the land.

III.

The land inhabited and improved by the claimant, and paid for by him on the 11th of November, 1891, had been raised in price to $2.50 per acre and put in the market prior to January, 1861, by reason of the grant of alternate sections to aid in the construction of railroads, and was of an alternate section reserved to the United States along the line of a railroad within the limits granted to the State of Wisconsin by the act approved June 3, 1866 (11 Stat. L., p. 20), to aid in the construction of railroads in that State, now known as the grant to the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and it was never alternate reserved land to the United States along the line of railroads within the limits granted by any other act of Congress to any other railway company.

IV.

At the time said cash entry was made and said money paid to the receiver at the local land office at Ashland, Wisconsin, it does not appear that the claimant made any protest or objection to said payment, nor assert any right to purchase the land at a less price than that which he was called upon to pay for said land.

V.

Said land had been raised to $2.50 per acre and put on the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, said land having been thus offered on June 14, 1856.

VI.

Application for repayment of one-half of the purchase money was made to the Commissioner of the General Land Office, and was refused, which said decision was affirmed by the Secretary of the Interior on March 19, 1895, upon the ground that this land was situated within the limits of a railway grant and that it was not a case where land was afterwards found not to be within the limits of a railroad grant, and was not a case which had been erroneously allowed and could not be confirmed within the meaning of those expressions as used in the act of June 16, 1880.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decide, as a conclusion of law, that the claimant recover judgment of and from the United States for the sum of two hundred dollars ($200).

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IV.

Final judgment.

At a Court of Claims held in the city of Washington, D. C., on the 4th day of June, A. D. 1900, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said William Edmonston do have and recover of and from the United States the sum of two hundred dollars ($200.00).

BY THE COURT.

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V.

Defendants' application for and allowance of appeal.

From the judgment rendered in the above-entitled cause on the 4th day of June, 1900, in favor of claimant, the defendants, by their Attorney-General, on the 11th day of June, 1900, make application for and give notice of an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed and allowed in open court June 11, 1900.

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VI.

In the Court of Claims.

WILLIAM EDMONSTON }
vs. } No. 18556.
THE UNITED STATES. }

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 17th day of July, 1900.

[SEAL.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

10 (Indorsed on cover:) File No., 17838. Court of Claims. Term No. 353. The United States, appellant, vs. William Edmonston. Filed July 19", 1900.

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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE UNITED STATES, APPELLANTS,
v.
WILLIAM EDMONSON. } No. 353.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF ARGUMENT ON BEHALF OF THE UNITED STATES.

STATEMENT.

This is a claim which was successfully prosecuted against the United States in the court below for the sum of $200, alleged excess of charge over the legal price for a certain tract of public land situate in the State of Wisconsin and described in Finding I, under the allegation that whereas the land was legally purchasable under the preemption laws at single minimum price the claimant was charged double minimum price therefor. The land in question had been raised to double minimum price and put into the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, and hence at the date of

the entry of said land by the claimant under the provisions of the preemption law, to wit, on March 11, 1891, it is contended that the land fell within the provisions of section 3 of the act of June 15, 1880 (1 Supp. Rev. Stats., 298. See 23 Stat., 237, for the whole bill), which provides as follows:

> The price of lands now subject to entry which were raised to $2.50 per acre and put into the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to $1.25 per acre.

It is found by the court that—

> At the time said [cash]* entry was made and said money paid to the receiver at the local land office at Ashland, Wis., it does not appear that the claimant made any protest or objection to said payment nor asserted any right to purchase the land at a less price than that which he was called upon to pay for said land. (Finding IV, Record, p. 3.)

Subsequently, however, application was made by the claimant to the Department of the Interior for repayment of one-half of the purchase money upon the theory outlined above, which was duly considered by that office and on March 19, 1895, rejected upon the ground that this land was situated within the limits of a railroad grant and that it was not a case where the land was afterwards found not to be within the limits of a railroad grant, and was not a case which had been

* The word "cash" in this finding is a clerical error. The entry was made under the preemption law. (See Finding I.)

erroneously allowed and could not be confirmed within the meaning of those expressions as used in the act of June 16, 1880 (21 Stats., 287); and that inasmuch as there was no other authority in law for making such repayment said application must be denied. (See Finding VI, Record, p. 3, and case reported in 20 L. D., 216.)

In rendering judgment in favor of the claimant in this case the court below did not file any opinion, and we are therefore at a loss to know whether the court rested its judgment upon the provisions of the act of June 16, 1880, or upon its general jurisdiction, upon the theory that the facts raised an implied contract to pay back the money thus determined to have been erroneously charged. A very large number of cases of this sort are now pending in the Court of Claims, and it is essential that the issues of law here involved should be determined by the court of last resort, and although the case at bar is seemingly insignificant in amount, yet in view of the great importance of the questions presented, and of the great number of other cases pending before the court involving the same questions, counsel deem themselves justified in presenting the issues to the court fully and at some length.

ASSIGNMENT OF ERRORS.

The court below erred:

I.

In holding, if it did so hold, that the facts in the case at bar brought the same within the purview of the repayment provisions of the act of June 16, 1880.

II.

In holding, if it did so hold, that there was any implied contract on the part of the United States for the repayment of the money embraced in the judgment of the court below.

III.

In assuming jurisdiction over the cause of action set up in the claimant's petition.

IV.

In rendering judgment against the United States in the sum of $200, or any other sum whatsoever.

BRIEF OF ARGUMENT.

Inasmuch as the court below did not file any opinion in this case, we are left without certain knowledge of the ground upon which the judgment of the court below is made to rest. Manifestly, however, the judgment must rest upon the construction of the provisions of the act of June 16, 1880, or else upon the general jurisdiction of the court, founded upon the theory that the facts presented in the findings make out a case of implied contract within the meaning of that expression as used in the Tucker Act. It is necessary, therefore, to consider the judgment upon both grounds, and this brief will submit to the court these three propositions:

First. That the facts disclosed in the findings do not entitle the claimant to relief under the provisions of the act of June 16, 1880.

Second. That the facts disclosed in the findings are not sufficient to create an implied contract on the part

of the United States for the repayment of the sum for which judgment was rendered.

Third. That the payment here made, conceding it to have been greater than the lawful price of land, was in all respects a voluntary payment, which could not be recovered back.

Of these in their order—

I.

THE FACTS DISCLOSED IN THE FINDINGS DO NOT ENTITLE THE APPELLEE TO THE RELIEF PROVIDED FOR IN THE ACT OF JUNE 16, 1880.

By section 2 of the act of June 16, 1880 (21 Stats., 287), it is provided as follows:

> In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said lands, whenever such entry shall have been duly canceled by the Commmissioner of the General Land Office; and in all cases where parties have paid double minimum price for land which has *afterwards been found not to be within the limits of a railroad grant*, the excess of $1.25 per acre shall, in like manner, be repaid to the purchaser thereof, or to his heirs or assigns.

In the case of *Medbury* v. *United States* (173 U. S., 492) it was urged that the provisions of this act invested the Secretary of the Interior with exclusive jurisdiction over the relief therein mentioned, and that the Court of Claims was without jurisdiction over the provisions of that act, upon the ground that the right and remedy were created by the same legislative enactment; but this court denied the correctness of that contention and held that the Court of Claims had jurisdiction over the provisions of that statute, for the reason that it was a right founded upon a law of Congress within the meaning of that expression as used in the Tucker Act. The court, however, proceeded to construe this act of June 16, 1880, and dismissed the petition in the case for the reason that at the time the entry was made the land was situated within the limits of a railroad grant, and that it did not fall, therefore, within the provisions of this act, the case not being one where "double minimum price was paid for land which was afterwards found not to be within the limits of a railroad grant," albeit the railroad was not built and the grant was subsequently forfeited by an act of Congress. In this decision this court confirmed the construction placed upon that act by the Interior Department, and which has been uniformly administered by that Department, to wit, that in order to obtain the repayment mentioned in the last clause of section 2 of this act there must have been an error of fact existing at the time the entry was made—that is to say, at the time the entry was made it must have been supposed by the entryman and by the land officers that

the land entered was in fact within the limits of a grant to a railroad, when, as a matter of fact, as subsequently discovered, the land was not within the limits of any railroad grant at the time of its entry.

It seems to us that a bare inspection of this statute establishes the fact that it was designed to correct errors of fact only, and the injustice which might result therefrom in the absence of some provision authorizing the repayment of the money thus erroneously received upon facts mistakenly supposed to exist. The instances in which the money is authorized to be refunded may be thus specifically enumerated:

First. Where the entry has been permitted by the local land officer to be made erroneously and which has to be canceled because it is now found to be in conflict with a prior entry—that is, for the whole or a part of the same land taken under a prior entry.

Second. Where for any other cause the entry has been erroneously allowed and can not be confirmed, such, for example, as an entry erroneously allowed on land subsequently ascertained to be in the Indian domain, or on a military reservation, or in the withdrawn sections of a railroad grant, etc.

Third. Where the entryman erroneously paid the double minimum price for lands which at the date of entry were supposed to be within the limits of a railroad grant, but which are subsequently discovered not to have been within the limits of such grant at the date of the entry—such, for example, as unsurveyed or erroneously surveyed land where the line limit of

the grant was not correctly known, or where, prior to the entry, the grant had been changed, which change was overlooked by the local land officers, etc.

Manifestly the claim at bar can not fall under either the first or second of these provisions, because in such case the act provides that repayment can only be made when the entry shall have been canceled by the Commissioner of the General Land Office and a relinquishment thereof been made by the entryman, which in this case, of course, has not been done. It must, therefore, come within the third provision in order to be founded upon the statute at all; and manifestly it can not come within this clause of the statute for the very simple reason that the land is now, and always has been, within the limits of a railroad grant and is in no sense land for which double minimum price has been paid which has afterwards been found not to be within the limits of a railroad grant. It seems to us that the case of *Medbury* v. *United States* (173 U. S., 492, 499, 500) is conclusive upon this subject. That was a case in which the return of one-half of the purchase price was sought under the provisions of the act of June 16, 1880, upon the notion that where land, which, at the date of its purchase, was within the limits of a railroad grant, subsequently fell without such limits by reason of the fact that the grant was forfeited, came within the provisions of this act providing for repayment. But this court, speaking through Mr. Justice Peckham, said:

> The Secretary decided that the act does not apply to a case such as this where at the time

of the entry the lands were within the limits of a railroad grant, and so continued for eighteen years, and where it was only by the failure of the railroad company to build the road and the forfeiture of the land grant by the Government consequent upon such forfeiture that the land then ceased to be within such limits. Whatever may have been the reason of Congress in making the charge $2.50 per acre the minimum price for alternate sections along the line of railroads within the place limits of the grant, the meaning of the act of 1880 is not in anywise affected thereby. That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties suppose that the land entered was within the limits of a grant, and where subsequently it was discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the land which he thought he was obtaining by virtue of his entry, then the act of 1880 applies. Here no mistake whatever has been made. The lands were within the limits of a land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress. * * * Hence, when in subsequent years the company failed to build its railroad within the limits of the land grant at this point, and the same was forfeited, the Government was under no obligation whatever by virtue of the act of 1880 *or otherwise* to repay the difference in price for these lands.

And such has been the uniform construction placed upon this act by the Interior Department. (See *Texas*

Pacific Grant, 8 L. D., 530; *Jacob A. Gilford*, id. 583; *George G. Foster*, 12 L. D., 316; *Medbury*, 25 L. D., 308.) And it is well settled by the decisions of this court that the contemporaneous and uniform construction placed upon a statute by the Executive Department which is charged with its execution is entitled to the greatest respect, and will not be overturned by the courts unless it is clearly erroneous. (*United States* v. *Moore*, 95 U. S., 760–763; *United States* v. *Healy*, 160 U. S., 136–141.)

Conceding, therefore, that the land in question fell within the provisions of section 3 of the act of June 15, 1880 (1 Supp. Rev. Stats., 298; 23 Stats., 237), and that the appellee was improperly charged and erroneously paid double minimum price therefor, still there is nothing in the provisions of the act of June 16, 1880, which would justify the court below in rendering judgment in his favor for the return of the excess over single minimum price.

This brings us to the consideration of the second point, which is whether there is any provision of law in the original jurisdiction of the court which would justify the judgment.

II.

THE FACTS DISCLOSED IN THE FINDINGS ARE NOT SUFFICIENT TO ESTABLISH AN IMPLIED CONTRACT AGAINST THE GOVERNMENT WHICH IS ENFORCIBLE IN THE COURT OF CLAIMS BY AN ACTION *EX CONTRACTU*.

The Court of Claims is invested with jurisdiction over suits against the United States for—

> All claims founded upon the Constitution of the United States or any law of Congress, ex-

> cept for pensions, or upon any regulation of an executive department, or upon any contract expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort. (24 Stats., 505.)

It having been already shown that this claim has no foundation upon the law of Congress of June 16, 1880, it follows that jurisdiction to render the judgment must rest upon a cause of action set up in the petition which makes out an implied contract against the Government within the meaning of that expression as used in the above-cited act of jurisdiction. It is confidently submitted that the facts in the case at bar are not sufficient to create a contract "expressed or implied against the Government of the United States."

What is an implied contract? It is a contract—just as much of a contract as though it had been reduced to writing and signed by the parties with their names at the end thereof; and the only difference between an implied contract and an expressed one is in the method by which it is proved. In the one case the evidence to prove the contract is by the production of the written instrument, and in the other case by the introduction of such facts and circumstances as will induce a court to say that the parties intended to contract, although they did not reduce such intention to writing. An implied contract, therefore, is none the less a contract—and all the elements of a contract—privity, certainty, consideration, and mutuality of agreement—are necessary to its existence. The facts relied

upon to establish an implied contract must negative any other hypothesis than that of a mutual agreement between the parties, understood and acted upon by both, though expressed by neither. And unless the facts and circumstances of a given case are such that the court can declare with certainty the existence of this actual though unexpressed contract, it follows that the case is not one of implied contract, and if it be not an implied contract, it should not be called such nor treated as such, nor should the powers of a court of limited jurisdiction be extended beyond the scope of the jurisdictional statute in order to administer relief to a claimant, however deserving, upon the erroneous notion that a moral obligation can be enforced as if it were a contract.

The definition of an implied contract which we have given above will not be questioned. It is the universal and uncontradicted doctrine of the courts of the English-speaking world. An extended array of authorities on this point would be superfluous—an example or two will suffice.

In his work on contracts, Story says (Story on Contracts, 5th ed., sec. 11):

> Where the agreement is a matter of inference and deduction, it is called an implied contract. Both species of contracts, however, are equally founded on the actual agreement of the parties, and the only distinction between them is in regard to the method of proof, which belongs to the law of evidence. In an implied contract the law only supplies that

> which, although not stated, must be presumed to have been the agreement of the parties.

And so this court in the case of *Schillinger* v. *United States* (155 U. S., 163) dismissed a claim for the use of a patented invention because the invention was used by the agents of the United States in denial of the rights of the plaintiff, and inasmuch as at the time the invention was used there was no recognition on the part of the Government's agents of private ownership, there could not possibly arise any implied promise to pay for the use of the invention. The court said (at p. 167) "some element of contractual liability must lie at the foundation of every action;" and this contractual liability is fully defined on page 170, where the court say:

> There was no point in the whole transaction from its commencement to its close where the minds of the parties met or where there was anything in the semblance of an agreement.

It is true that the court say that this was a tort on the part of the Government's officers; but the tort was the mere result of an absence of an agreement to pay, because of an absence of a recognition of private ownership; and it was this absence of all contractual relations which caused the dismissal of the case, and such dismissal would have followed whether the facts of the case were such (in the absence of contractual relations) as to make a tort or not, for the reason that the court would be without jurisdiction to render a judgment in the absence of a contract, express or implied.

So it is settled that where the United States takes possession of and uses property which at the time it asserts to be its own, and denies the ownership of the plaintiff—takes the same under a claim of right—no implied contract to pay for the value of the property thus taken arises which can be enforced against the United States in the Court of Claims, although it transpire in the proof that the claim of the United States was erroneous and that the property taken did in fact belong to the plaintiff. (*Langford* v. *United States*, 101 U. S., 341; *Hill* v. *United States*, 149 U. S., 592.) In the latter case the court said:

> An action in the nature of assumpsit for the use or occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser (citing cases).
>
> In *Langford* v. *United States* (*supra*) it was accordingly adjudged that when an officer of the United States took and held possession of land of a private citizen under a claim that it belonged to the Government, the United States could not be charged upon an implied obligation to pay for its use and occupation. * * * The case at bar is governed by the Langford case. It was not alleged in this petition nor admitted in the plea that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title in the land in question, with the exclusive right of building

thereon, and claimed damages of the United States for the use and occupation of the land for a light-house. The United States positively and precisely pleaded that the land was submerged under the waters of the Chesapeake Bay, one of the navigable waters of the United States, and that the United States under the law, for the purpose of a light-house, has a paramount right to its use as against the plaintiff or any other person, and the plaintiff demurred to this plea. The circuit court, instead of rendering judgment for the United States upon the demurrer, should have dismissed the suit for want of jurisdiction.

[See, in accord, *Church* v. *Gas Co.*, 6 Ad. and El., 859; *O'Conner* v. *Hurley*, 147 Mass., 144, 148; *Day* v. *Caton*, 119 Mass., 513; *Holmes* v. *Board of Trade*, 81 Mo., 137; *Potter* v. *Carpenter*, 76 N. Y., 157; *Moyer's Appeal*, 112 Penn. State, 290; *Pew* v. *Gloucester Bank*, 130 Mass., 391, 396; *La.* v. *R. R.*, 27 La. Annual, 641; *Heffron* v. *Brown*, 155 Ill., 322; *Hertzog* v. *Hertzog*, 29 Penn. State, 465, 467, all of which are direct adjudications upon this issue and which enforce, under a wide variety of facts, the doctrines here laid down.]

Thus for work and labor performed, or for services rendered, or for money had and received, before an implied assumpsit or contract can be successfully urged, the facts must show that the services rendered, or the work and labor performed, or the material furnished, were furnished by one party and accepted by the other under such circumstances as will show that the party furnishing them expected at the time to be paid, and

that the party receiving them knew of this expectation, and so knowing received and accepted the benefits of the thing furnished. But the mere fact that something was furnished by one party and received by another will not justify an implied promise to pay for it. (*Holmes* v. *Board of Trade*, 81 Mo., 137; 1 Keener's Selections on Contracts, pp. 17, 18; *Jones* v. *Woodbury*, 11 B. Mon. (Ky.), 168, 172.)

In *O'Conner* v. *Hurley* (147 Mass., 144, 148) it was held that the fact that a house had been erected upon land supposed to belong to the mother, but in which the mother only owned a dower interest, will not raise an implied contract or promise on the part of the daughter, who owned the fee in the land, to pay for such house, although she knew of its being built, and although her property was thereby quadrupled in value.

So it is well settled that one under a salary or other contract pay who performs, without an express understanding as to compensation, duties in excess of what the contract of employment demands, will be presumed to have rendered it under the contract of employment, and no promise to pay for such extra service will be implied. (*Pew* v. *Gloucester Nat'l Bank*, 130 Mass., 391, 396; *Levisen* v. *R. R.*, 27 La. Annual, 641.) In the first of the above-cited cases the president of a national bank performed services for the bank outside or beyond the scope of his official duties, to wit, the preparation of plans for, and the superintendence ot the erection of, the bank building. In the

second case the same service was performed by a president of a railroad corporation in and about the construction of a depot. In both cases the corporations knew of the services, made no objection to it, and accepted the benefit of it and profited by said services, which, in both cases, it was admitted on all hands, were not services which were required by the contract of employment. No agreement, however, was had for extra compensation and no claim was made for the services at the time they were rendered, nor until the services had been completed, when actions were begun to recover the value of the services upon the theory that the law would imply a contract to pay for that which the corporations had accepted, used, and received the benefits of. The courts summarily disposed of both cases upon the ground that the corporations at the time they permitted the work to be done had no notice that any extra pay was expected for it; that the persons performing the services were bound, if they intended to claim extra pay, to so notify the corporations at the time, and that not having made any such claim at the time, the corporations had a right to presume that no extra pay would be demanded, and that the law would not imply a promise to pay for such services by one who had no notice that pay would be required at the time he accepted it; in other words, to use the expressive language of the chief justice of the Court of Claims in *Boston* v. *District of Columbia* (19 C. Cls. R., 31, 32): "It is a general principle that no man can be forced into a contract against his will."

Bearing in mind these thoroughly well-settled doctrines of the law of contract, let us inquire concerning the facts relied upon in this case to make out an implied contract to repay to the appellee one-half of the purchase money which he paid to the Government for the land in question.

On March 11, 1891, the appellee filed his declaratory statement under the preemption laws, declaring his intention to preempt the land in question. This declaration was to expire on March 2, 1892. On September 16, 1891, the appellee gave the public notice required under the law of his intention to make final proof at the land office at Ashland, Wis., on November 9, 1891, and upon that date satisfied the local register and receiver at Ashland, Wis., that he had complied with the requirements of the preemption laws. And thereafter, to wit, on the 11th of November, 1891, he paid to the receiver at Ashland, Wis., the sum of $400 for said land, which the register demanded as the lawful price of said land, and which the appellee, believing it to be the lawful price of the land, paid. The appellee did not make any protest or objection to the payment of the said sum of money, nor did he assert any right to purchase the land at any less price than that which he was called upon to pay. The receiver of public moneys at the Ashland office received this money from the claimant under a claim of legal right as being justly due and owing to the United States, and the appellee paid it in the belief that it was justly due and owing to the United States in compensation for the land which he had preempted. He not only did not assert any

right on his part to retain one-half of the $400 which he paid, and for which he now sues to recover, at the time the payment was made, but acquiesced in the claim of the appellant's agents that it was justly due and owing to the United States. How, then, can it possibly be said that at the time of this transaction there resided in the mind of either party the slightest thought of ever repaying one-half of this money, or ever demanding it back, or of ever receiving it back on the part of the appellee? How can it possibly be said that at the time this transaction was had there resided in the mind of either party any intention to contract or promise for the return of one-half of the money paid to the receiver by the entryman? Such a thing is an impossibility, because at the time the money was paid by the one party and received by the other there was no thought on the part of either but that the money was lawfully paid and lawfully received, and, therefore, of course, there could not have possibly resided in the mind of either any intention of repaying or expectation of receiving back one-half of it. It was not until long after the transaction had been consummated and completed and patent issued to the entryman for his land that any thought of receiving back one-half of the purchase money ever entered the mind of the appellee, and then probably upon the advice of his counsel that the sum had been erroneously charged. The money was demanded under a claim of right just as the patented invention was used in the Schillinger case under a claim of right, and just as private property was appropriated by

the Government in Hill's case, and in Langford's case under a claim of right; and, just as in those cases, it is entirely immaterial whether this claim of right subsequently turns out to have been unfounded, for it is sufficient that the property was taken under the belief or under the assertion that the Government had a right to use it, for in that case there is a complete negation of any notion of an implied contract to pay for its use or its value. Just as no contract could arise in those cases because the agent taking or using the same did so under a claim of right, which is necessarily the very antithesis to a promise to pay for the thing, so here there can exist no implied contract to refund money which was demanded and received under a claim of right, without any assertion on the one part or recognition on the other part of any private ownership therein, because such facts are the very antitheses of those which are necessary to make out a case of implied contract. We therefore submit that the facts in the case at bar are clearly within the principle of the decisions of this court in the Schillinger case, the Langford case, and the Hill case; and we further insist that it is entirely immaterial that in those cases the court found that the facts were not only sufficient to negative the notion of an implied contract, but were also sufficient to create a tort against the plaintiff. The creation of a tort by the evidence is only an additional reason for excluding the case from the jurisdiction of the court under the provisions of the Tucker Act, in prohibiting that court from assuming

jurisdiction over cases which sound in tort—the creation of a tort is merely cumulative. Whether the facts do or do not make out a case of tort, yet if they are such as to negative the inference or the construction or the implication of a promise to pay for the thing taken or used, or for the return of the thing appropriated at the time of the transaction, then all notion of an implied contract is necessarily at an end, and the Court of Claims is utterly without jurisdiction to found a judgment upon any such condition of facts—tort or no tort. If the Government "in equity and good conscience" should return this money to the appellee, then the Court of Claims can very safely emulate the example of this court in *Smoot's case* (15 Wall., 36–45), when it relegated the claim to the Congress for relief, saying:

> There arises in the minds of parties and counsel interested for the individual against the Government a sense of the power and resources of this great Government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity coloring even the closest legal argument. These are addressed in vain to this court. Their proper theater is the halls of Congress, for that branch of the Government has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be and to which the ordinary principles of contracts must and should apply.

III.

THE APPELLEE'S RIGHT TO CLAIM A RETURN OF THE MONEY IS AT BEST A MERE MORAL RIGHT. THE JURISDICTION OF THE COURT OF CLAIMS TO RENDER JUDGMENTS AGAINST THE UNITED STATES IS LIMITED TO CONTRACTS EXPRESS OR IMPLIED—REAL CONTRACTS. IT HAS NO POWER TO ENFORCE A MORAL OBLIGATION. THAT POWER RESTS EXCLUSIVELY WITH THE CONGRESS.

We are aware that, in courts of *unlimited* jurisdiction, moral obligations have been permitted to be enforced by contract remedy as obligations arising *ex lege*. But in cases of this sort it is necessary to constantly bear in mind the two fundamental reasons for such decisions. The first is that the courts administering the relief were courts of *unlimited* jurisdiction, and were not circumscribed by the provisions of statutory authority. The second is that the relief, if not administered by the courts, could not have been obtained by the plaintiff in any other form. Neither of these reasons exist in the Court of Claims, for, in the first place, the Court of Claims is not a court of *unlimited* jurisdiction, but is a court of limited and circumscribed jurisdiction, given power to render judgments against the sovereign government only in certain well defined and specified cases; and the Court of Claims, before it has any power to render judgments against the Government, must find its warrant for so doing in the plain language of the statute creative of its jurisdiction, which statute must be strictly construed, for the sovereign can not be sued except in such cases and before such tribunals as it has plainly authorized. And in the second place, the sufferer, if debarred from relief in

the courts, is not without any other remedy, for he has at all times his right of appeal to the Congress, which has plenary power to administer such abstract right and moral equity as it has withheld from the jurisdiction of the court or to refer the claim to the Court of Claims by special act, as is frequently done.

The only reason why an obligation of this sort was enforcible at common law by a contract remedy was because of the paucity of common-law action, there being only actions *ex contractu* and *ex delicto*. There was really no reason why the obligations should not have been enforced by an action *ex delicto*, and indeed it would seem to be a much more appropriate remedy than an action *ex contractu*, for the action is really one of damages for the perpetration of a wrong, and not in any sense an action to recover for a breach of contract. But although the remedy was given *ex contractu*, the remedy had no sort of relation to the right, and the enforcement of the obligation was not strictly *ex contractu*, but *quasi ex contractu*. It must always be borne in mind that the analogy between this right and a contractual right is an analogy of *remedy only*. The word "*quasi*" in this connection signifies "analogous to," and refers to the *remedy* and not to the *right*. A *quasi* contract *is not a contract at all*, but merely the imposition of a moral obligation enforcible by a contract remedy. (Maine on Ancient Law, 1 Amer. ed., pp. 332, 333; Auston's Juris., 3 Eng. ed., vol. 2, p. 1016 *et seq.*; *Wood* v. *Ayers*, 39 Mich., 345, 352, 353, 354; *Hertzog* v. *Hertzog*, 29 Penn. State, 465, 467;

Dusenbury v. *Spier*, 77 N. Y., 144; *O'Brien* v. *Young*, 95 N. Y., 426; *Milford* v. *Commonwealth*, 144 Mass., 64; Keener Quasi Contracts, chap. 1, *passim.*) But a statute which limits the jurisdiction of a court to "contracts express or implied" does not entitle a court to take cognizance of moral obligations, or obligations arising *ex lege*, and to enforce them as if they were genuine contracts. This is well shown in the decision in *Dusenbury* v. *Spier* (77 N. Y., 144), where the legality of an arrest turned upon the meaning to be given to the words "contract, express or implied," as used in the statute regulating arrests in civil actions. The plaintiff was arrested on a warrant issued on the theory that the action was one of contract, express or implied, within the meaning of those words as used in the statute. It was held that his liability was in *quasi* contract, or constructive contract, and that the phrase "contract, express or implied" was used in the statute with reference solely to genuine contracts. The arrest was therefore held illegal, and the judgment was reversed.

In the case of *Woods* v. *Ayers* (39 Mich., 345, 352, 353) the question arose in this wise: The defendant was sued by the plaintiff in an action for the recovery of money due for goods sold and delivered. The defendant pleaded as an offset to the demand of the plaintiff a liability of the plaintiff which accrued to the defendant under a statute of the State which provided in effect, that where any person obstructed a navigable river with logs or timber, they might be removed by

anyone desiring to use the stream; and the person who placed them in the stream should be "liable" to the person who removed them for all costs and expenses of such removal. But the set-off statute of Michigan confines the right of set-off to cases arising upon contracts, and the question was whether the plaintiff's liability to the defendant under this log statute could be regarded as arising upon a contract so as to enable the defendant to plead it as a set-off to the plaintiff's suit for goods sold and delivered. The court held that the liability was merely one which arose *ex lege;* that there was wholly wanting the consent of parties, the mutuality of agreement, the consideration, and every other element which goes to make up a contract; and that, therefore, the liability imposed by this statute could in no sense be regarded as a liability arising upon a contract, and was not, therefore, a proper subject of set-off under the Michigan statute relating to that subject.

The precise question in the case at bar was decided in the case of *Milford* v. *Commonwealth* (144 Mass., 64), where it was held that the jurisdiction given to a superior court by a statute "of all claims against the Commonwealth which are founded on contract for the payment of money" did not extend to an *obligation* imposed upon the Commonwealth by statute to reimburse the expense incurred by a town in support of a State pauper. In this case the court said:

> A contract may be expressly made, or a contract may be imposed or implied when it is found that there is an agreement of the parties and an intention to create a contract, although

that intention has not been expressed. In either case there is an actual contract. But a contract is sometimes said to be implied when there is no intention to create a contract and no agreement of the parties, but the law has imposed the obligation *as if* (*quasi*) it were an obligation arising *ex contractu*. In such a case there is *not* a contract, and the obligation merely arises *ex lege*. We are of opinion that the statute was not intended to give the superior court jurisdiction over obligations for the payment of money imposed by a statute upon the Commonwealth. There are many such obligations, but they are not within any of the definitions of a contract, all of which require a consent or agreement of the parties. *These statutory obligations must be performed by the officers of the Commonwealth or by the legislature.* * * * No judicial remedy against the Commonwealth has been provided, and the Commonwealth can not be sued in its own courts without clear statutory authority.

IV.

THE PAYMENT MADE BY THE APPELLEE, BEING MADE WITH A FULL KNOWLEDGE OF THE FACTS AND WITHOUT ANY MISTAKE OF FACTS, CAN NOT BE RECOVERED BACK, ALBEIT THE PARTY PAYING AND THE PARTY RECEIVING THE MONEY WERE BOTH MISTAKEN AS TO THE LAW.

The facts disclosed by the findings clearly establish a case of voluntary payment with a full knowledge and understanding of the facts by the appellee, and paid by the appellee because he thought he ought to pay. A payment of this sort can not be recovered back, notwithstanding the appellee's mistake of the law.

The findings disclose that the declaratory statement required by the preemption laws was filed by the appellee before the local land officers at Ashland, Wis., on the 11th of March, 1891, and that on November 11, 1891, he made the necessary proof and purchased the land at the rate of $2.50 per acre for the 160 acres thus preempted, paying therefor the sum of $400. In Finding I it is not specifically stated whether on the 11th of March, 1891, at the time the appellee filed his declaratory statement, he made any inquiry as to the price of the land. But this omission is corrected in Finding IV, where it is specifically found that he made no objection to the price of the land either at the time the entry was made (to wit, on the 11th of March, 1891) or at the time the money was paid (to wit, November 11, 1891). Finding IV is as follows:

> At the time said [cash] entry was made and said money paid to the receiver at the local land office at Ashland, Wisconsin, it does not appear that the claimant made any protest or objection to said payment, nor asserted any right to purchase the land at a less price than that which he was called upon to pay for said land.

We have, therefore, a man who comes before an officer of the local land office and files a declaratory statement of his intention to preempt a certain piece of land within the limits of a railroad grant. He is informed of the price of the land, makes no objection to the price, and does not assert any right to purchase the land at a less price. He goes away and makes the

improvements on the land which the preemption laws require and seven months later he returns to the local land office, and, after making due proof of his compliance with the requirements of the preemption laws, pays to the receiver of the land office the sum of $2.50 an acre, without any question as to the legality of the charge and without the assertion of any right on his part to purchase the land at a less price. There was no fraud; there was no oppression; there was no duress; there was no coercion on the part of the agent of the Government who received from the appellee the money thus paid. There was no mistake of facts on the part of the appellee; there was no concealment of any facts on the part of the agent of the United States; there was neither protest nor objection on the part of the appellee to the price charged for the land and by him willingly paid, nor was there an assertion of any right on his part to purchase the land for a less price. The whole case is one simply of an officer of the Government charging a certain price for land because he believed it to be the lawful price thereof, and of that price being paid by the entryman because he also believed it to be the lawful price thereof. It is a pure case of a mistake of law, and money paid under these circumstances can never be recovered back.

The right to recover back money paid to another who is not rightfully entitled thereto and who can not in equity and good conscience retain it, is a very exceptional one and is closely watched, and only arises out of two classes of transactions: First, where the party, although he pays it voluntarily and without

objection, does so under a mistake of fact; and, secondly, where, knowing the facts and suspecting the law, he makes protest and only pays under compulsion or duress, which the other party, by reason of his position, is able to exercise over either the person or the property of the payor.

The two classes are perfectly distinct, and a given transaction must belong to one or the other, and once being located, only confusion of thought results from an attempt to examine into the existence of those elements which are material to those of the other class only. The claim in the case at bar falls wholly within the first class, namely, that of a payment made with a full knowledge of the facts and without any thought or knowledge of any unlawfulness of the demand. As a result, it is entirely immaterial that he did not protest, and also immaterial whether the party receiving the money was in a position to coerce. Protest and coercion are both impossible conditions of a payment voluntarily made by one who *believes he ought to make it.* Conceding, then, that $1.25 per acre was the lawful price of this land, and that the claimant, believing such price to be lawfully the sum of $2.50 per acre, under the law, paid that sum by reason of such erroneous belief, yet he wholly fails to show a case for recovery back. It is not enough that the receiver ought not in equity and good conscience to retain the money; that condition is merely cumulative of the other one, that the money must have been paid by reason of a mistake of fact, and the latter is just as essential a matter as the former. For example, in the case

of *Corkle* v. *Maxwell* (3 Blatchf., 413), it was held that a person who has his private warehouse designated by the Secretary of the Treasury as a place for the storage of dutiable merchandise, under an act of Congress, and who, on being *required* by the Government, before the depositing of any goods in his warehouse, elected to pay the collector either the salary of an inspector or one-half of the accrued storage at public storage rates, elects the former and makes payment thereunder, which is paid into the Treasury, can not recover it back, *although the Government had no legal right to demand* the payment, for, just as in the case at bar, the party paying and the party receiving both believed at the time that the payments were lawfully demanded and lawfully payable.

In *Knibbs* v. *Hall* (1 Esp. N. P. Cas., 83) a tenant was not permitted to recover back from his landlord, or to be allowed by way of set-off, a sum of money which he had paid beyond the rent actually due from him on the supposition that he must otherwise suffer distress. To the same effect is *Brown* v. *Kinnally* (1 Esp. N. P. Cas., 279) and *Marriott* v. *Hampton* (2 Esp. N. P. Cas., 547).

In the case of *Bilbie* v. *Lumley* (2 East., 469) Lord Ellenborough said he never heard of a case in which a party who had paid money to another voluntarily with a full knowledge of the facts of the case had been permitted to recover it back on account of his ignorance of the law.

In the case of *Brisbrain* v. *Dacres* (5 Taunt., 144) this subject was elaborately considered by the court

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and the principles of *Bilbie* v. *Lumley* (*supra*) were recognized and upheld. Brisbrain, who was the captain of a frigate belonging to a squadron under the command of Admiral Dacres, received from the Government £850 for freight of certain public moneys, and from the Bank of England upward of £7,000 for freight of money of individuals. He paid over to the admiral one-third of the sums thus received, under the belief that he was legally entitled to it; but on discovering that he was not, he brought his action to recover it back. It was shown to be the usage in the navy for a captain of a vessel carrying public and private freight to pay one-third of the freight of the same to the commander of the squadron to which he belonged, though it was admitted that the admiral had no legal claim to any portion of the allowance. But the court held that the money, having been paid with a full knowledge of the facts and circumstances of the case, could not be recovered back because it had been paid under a misapprehension of the law. Mr. Justice Gibbs says that:

> Where a man demands money from another as a matter of right, and he pays it with a full knowledge of the facts upon which the demand is founded, he can never recover back the sum he has so voluntarily paid. He who receives it has a right to consider it as his without dispute, and it would be most mischievous and unjust if he who had acquiesced in the right by such voluntary payment should be at liberty at any time to rip the matter up and recover back the money.

The proposition that where money is paid under a mistake which there was no ground to claim in conscience the party may recover it back in an action of assumpsit is applicable only to mistakes of facts, and has no sort of application to a mistake of law; otherwise there would be no distinction between mistakes of fact and mistakes of law. A person who has paid money under a mistake of fact can not recover it back unless he is equitably entitled to it. The inquiry in every case, therefore, would be, not whether the money was paid under a misapprehension of the law or in ignorance of fact, for this would be immaterial, but whether the person to whom it was paid can in equity and good conscience retain it. If he can not, if there was any mistake of any character, he shall refund, for such a doctrine necessarily destroys all distinction between mistakes of law and mistakes of facts.

If this be so, why has the question been so frequently and elaborately discussed in the English and American courts, and not only in courts of law, but in courts of equity? How are the cases of *Bilbie* v. *Lumley* and *Brisbrain* v. *Dacres*, and hundreds of cases like them, to be reconciled to this principle? The doctrine is applicable to a mistake of fact, but is utterly inapplicable to a mistake of law. The distinction between mistakes of law and mistakes of fact is too well known to require argument. (2 Pom. Eq. Juris., 2 ed., sec. 840, 841.) The principle upon which courts refuse to relieve against mistakes of law is that in the judgment of the law there is no mistake, every man being held,

for the wisest reasons, to be cognizant of the law. The act, therefore, against which the party seeks relief is his own voluntary act, and he must abide by it. This principle steers entirely clear of conscience or the equity of a transaction. The policy of the law and the necessities of civilized society do not require that a man shall not be relieved against a mistake in fact, and hence if one pays money to another in mistake of fact and the other in equity and good conscience is not entitled to it, the payor may recover it back. But the policy of the law and the necessities of civilized society do require that a man shall know the law and that he shall not be eternally opening consummated transactions because of an alleged want of knowledge of the law. "Courts do not undertake," says Chancellor Kent, in *Lyon* v. *Richmond* (2 John. Chg., 51), "to relieve parties from their acts and deeds, fairly done, on a full knowledge of the facts, though under a mistake of law. Every man is charged at his peril with a knowledge of the law; there is no other principle which is safe or applicable in the common intercourse of mankind."

The doctrines of these leading cases have been fully adopted by this court in a great variety of cases.

Elliott v. *Swartout*, 10 Pet., 137, 152.
Bend v. *Hoyt*, 13 ib., 262.
Morris v. *Traver*, 1 Dal., 147.
Little v. *Bowers*, 134 U. S., 547.
Waples v. *United States*, 110 U. S., 630, 632.
Barney v. *Ricard*, 157 U. S., 352, 358.

In the case *Waples* v. *United States* (*supra*) is presented about the strongest case that can possibly arise

where the contention could be made that one should return money paid by another when in equity and good conscience he has no right to retain it. In this case there was a sale of certain lands under confiscation acts of Congress. It subsequently developed that the alleged offender was not the owner of the land, and in an action of ejectment brought for that purpose the purchaser from the Government lost his land and a considerable sum as mesne profits. Thereupon the purchaser from the Government brought suit in the Court of Claims for money had and received, alleging, with the best possible show of reason, that the Government had given nothing in return for the money paid to it, and that in equity and good conscience the amount so paid should be refunded. But this court was resolute and held that the purchaser was bound to know the law, and that a payment made in ignorance thereof could not be recovered back, albeit the recipient had given no consideration for it. This case thoroughly establishes the proposition that the notion that money paid under a mistake can be recovered back if the recipient is not in equity and good conscience entitled to keep it is applicable only to money paid under a mistake of fact, and has no sort of application to money paid under a mistake of law.

To this head may be referred the recent decision of this court in *United States* v. *Wilson* (168 U. S., 273, 276), where it was held that where a consul in his regular accounts and statements with the Treasury charges himself with fees received by himself as consul and

pays the same into the Treasury and upon retirement makes his settlement upon that basis, he can not afterwards recover back such payments by suit in the court of claims, even though entitled to the money, as such payment will be regarded as voluntary and hence non-recoverable. In that case the court said:

> There is no pretense that he paid the fees into the Treasury to avoid a controversy with any department of the Government, or that he ever made any objection or protest against the fees being charged to him as official fees. The Court of Claims so find in substance. If a voluntary payment can be made to the Government, it seems to us that this is such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official to the Government, we think that the payments made by the original claimant were voluntary. This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as a disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the Government without claim of any right to retain one penny of it.

Every word of this quotation is applicable to the case at bar, and must conclude the matter here. As was said in this case, so in the case at bar, "the facts show nothing but a voluntary payment of money to the Government without claim of any right to retain one

penny of it." A clearer case of voluntary payment could not be made out.

In addition to the leading cases already cited, the following cases may be referred to out of the great mass of cases on the subject of voluntary payments, because they are direct adjudications upon that issue, and illustrate the doctrines laid down in the text of the brief:

Clark v. *Dutcher*, 9 Cow. (N. Y.) (where the English and American authorities are elaborately reviewed).

Benson v. *Monroe*, 7 Cush (Mass.), 125.

Edge v. *Koontz*, 8 Pa. St., 109.

Bailey v. *Paulina*, 69 Iowa, 463.

Thompson v. *Daty*, 72 Ind., 336.

Regan v. *Baldwin*, 126 Mass., 485.

Ins. Co. v. *Stewart*, 95 Ind., 586.

Hipp v. *Crenshaw*, 64 Iowa, 404.

Hare v. *United States*, 9 Ct. Clms., 270.

R. R. v. *Thomas*, 85 Ill., 464.

Comstock v. *Tupper*, 50 Vt., 596.

Milnes v. *Duncan*, 6 Barn. & Cres., 671.

R. R. v. *Commissioners*, 93 U. S., 541, 543.

Phila. v. *Collector*, 5 Wall., 720, 731, 732, Div. 5.

Collector v. *Hubbard*, 12 Wall., 1–13, Div. 6.

As we said at the outset, the rules governing the second class of cases can have no sort of application here. The fact, if it be a fact, that the parties did not stand upon equal terms is wholly immaterial, because this class of cases involves as essential characteristics knowledge of his rights by the payor, and resistance,

or at least a reluctance to pay on his part, accompanied by insistence upon the part of the receiver clothed with some power of compulsion (*Maxwell* v. *Griswold*, 10 Howard, 242, 246). In the case at bar there was no reluctance or knowledge of suspicion of his rights under the law, and therefore it is utterly immaterial whether the receiver had the power to coerce, since that power did not in any wise bring about the payment.

The case of *Bailey* v. *Paulina* (69 Iowa, 463) presents an illustration. There the plaintiff was found guilty of a breach of a city ordinance. Believing the ordinance and conviction to be valid, he paid his fine while under actual arrest. Upon the ordinance being declared invalid he sued to recover back the fine. Notwithstanding all the opportunity of coercion, the court held that he could not recover, for the reason that the payment was caused, not by coercion or opportunity of coercion, but by the plaintiff's mistake of the law.

And so it is likewise entirely immaterial that the appellee here was dealing with a Government official. That makes no difference. If the payor believed that he ought to pay, and the payment was made for that reason and not because of coercion, this court has repeatedly held, notably in tariff cases, that such fact is utterly immaterial if, as in this case, the claimant paid without objection. (See *United States* v. *Wilson*, 167 U. S., 273, 276, quoted above.)

The case of *Elliott* v. *Swartout* (*supra*) is an illustration. There the importer paid duties supposed at the time, both by himself and the collector, to be lawful,

so that no objection or reluctance characterized the transaction on the one hand nor insistence or coercion on the other, although, of course, the collector, being in possession of the payor's goods, had plenary power to coerce. The court, utterly ignoring the lack of equality in the respective parties and the official character of the collector, applied exactly the same rules of law applicable to a payment between private individuals under a mistake of law, as we have stated above.

The law on this subject may be fairly, fully, and honestly summarized as follows:

(1) Money voluntarily paid with a full knowledge of all the facts can not be recovered, although paid under a construction of the law which subsequently turns out to be erroneous.

(2) All payments are voluntary where the party paying believes he ought to pay.

(3) All payments are voluntary when there is no duress operating upon the one nor fraud nor oppression practiced by the other, although the party paying believes he ought not to pay.

(4) If fraud, duress, or oppression be pleaded, it must be shown to be fraud, duress, or oppression from which the person making the payment has no immediate means of relief except by paying.

(5) If any other means of relief is at hand, as, for example, the litigation of the question in the courts, such means of relief must be resorted to, and if not resorted to, the plea of fraud, duress, or oppression will not avail.

In every aspect of this case, therefore, it is submitted that the judgment of the Court of Claims is clearly erroneous, and that the same should be reversed with instructions to dismiss the petition.

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No. 353.
Brf. of Spalding & Spalding for
Appellee.

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IN THE

Supreme Court of the United States.

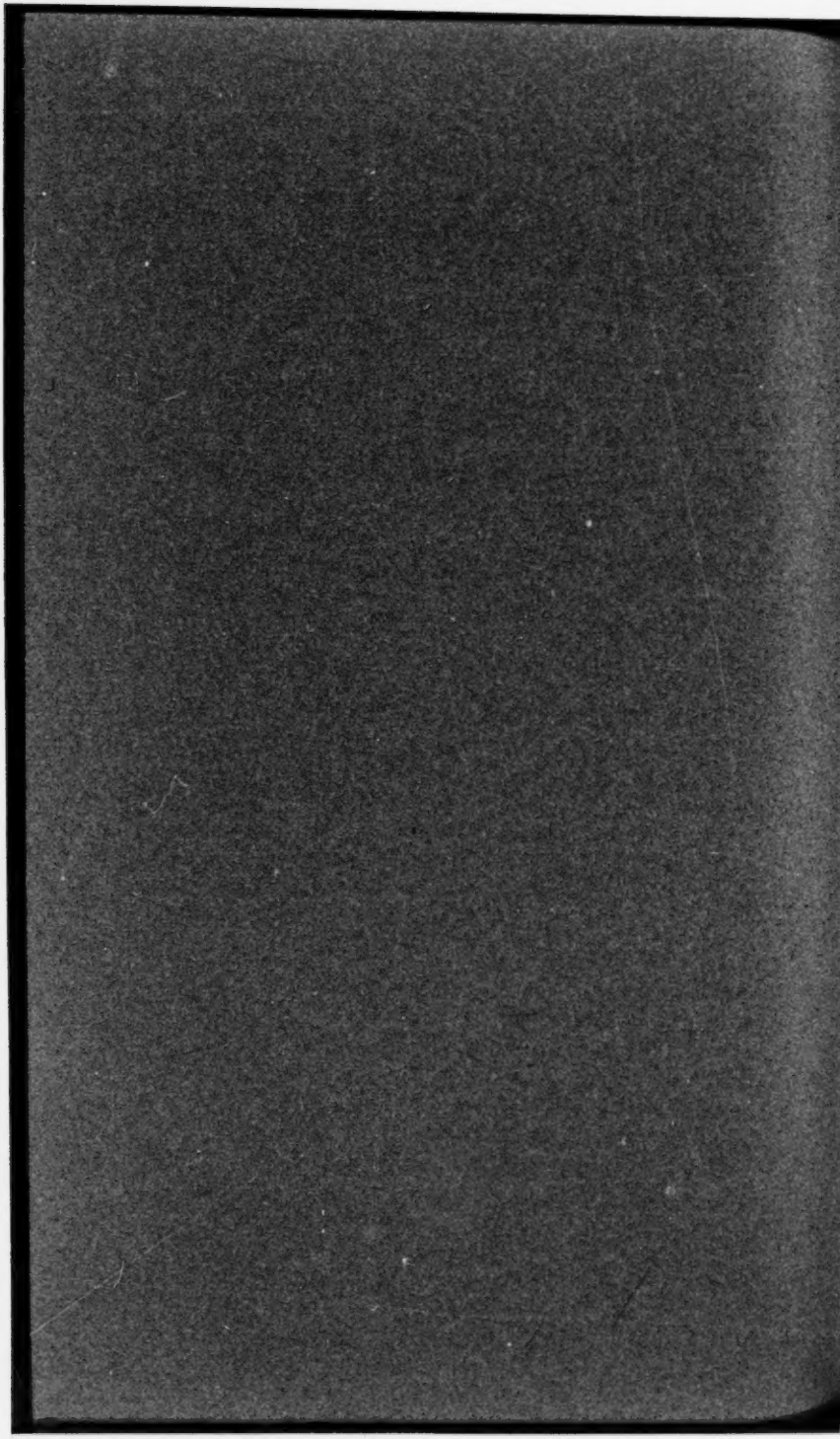
OCTOBER TERM, 1900.

THE UNITED STATES, *Appellants,*
v.
WILLIAM EDMONSTON, *Appellee.*
No. 353.

Appeal from the Court of Claims.

BRIEF OF ARGUMENT ON BEHALF OF APPELLEE.

HARVEY SPALDING,
E. W. SPALDING,
Attorneys for Appellee.



IN THE

Supreme Court of the United States.

THE UNITED STATES, *Appellant*,
v.
WILLIAM EDMONSTON. } No. 353.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

This case is an appeal by the United States from a judgment of the Court of Claims in favor of the appellee for $200, being the excess of $1.25 per acre overcharged the appellee on a pre-emption entry in Wisconsin in 1891 by the officers charged with the execution of the land laws. The appellee was required to pay $2.50 per acre for 160 acres, in order to secure the allowance of his entry and the subsequent issuance of the patent for the land, while the legal price of the land was but $1.25 per acre. It is now admitted by the Interior Department, and by counsel for the United States, in their brief, that the charge of $2.50 per acre instead of $1.25 per acre was an illegal charge, because of the fact that the price of the land in question was fixed at $1.25 per acre by the act of June 15, 1880, and the only defense now made to the action is by the contention: 1st, that the Court of Claims has not jurisdiction; and, 2d, that the payment was voluntarily made, and that, therefore, there is no right to recovery.

The Payment Was Compulsory.

The record of this case, and the decisions of this and other courts completely controvert the claim that this is a case of voluntary payment.

The record shows that upon the 11th day of March, 1891, the appellee filed a pre-emption declaratory statement for the land in question, declaring his intention to pre-empt, that is, to make entry of the land, within the time limited by law by paying the legal price for the land.

The form of the declaratory statement is not given in the findings, as it was not essential, but it must have been substantially as follows; this being the prescribed form:

"Declaratory Statement for Cases where the Land Claimed is Subject to Private Entry.

"I——of———, being———, have since the first day of——A. D. 18—, settled and improved the—— quarter of section No. —— of range No. —— in the district of lands subject to sale at the land office at ——, containing —— acres, which land had been rendered subject to private entry prior to my settlement thereon; and I do hereby declare my intention to claim the said tract of land as a pre-emption right, under section 2259 of the Revised Statutes of the United States.

"Given under my hand this——day of——A. D. 18—

"In presence of ——."

Having settled upon the land, and filed this declaratory statement announcing his settlement, appellee proceeded to comply with the law by cultivating and inhabiting the land. He lived upon the land for the required period and built a dwelling thereon. See Finding 1.

Having complied with the law, appellee became entitled to make formal entry of the land upon payment of the minimum price for the land. See section 2259 R. S.

Indeed this right to enter at the minimum price is the sole right that can be acquired under the pre-emption law. That law gives to the settler the preferred right to enter the land upon payment of the price which was assigned to the land by law.

This land having been raised to $2.50 per acre and put on the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes (Finding No. 5), was such land as was described by the act of June 15, 1880, and was by that act reduced in price to $1.25 per acre, and remained at that price both on the 11th day of March, 1891, and on the 11th day of November, 1891, when the appellee made payment for the land.

It appears from the record, Finding No. 2, that the appellee *was required* to pay $2.50 per acre for the land, instead of the $1.25 per acre fixed by the act of June 16, 1880.

He had to pay the price demanded by the officers of the land office or lose not only the land, but the improvements, including the dwelling that he had erected upon the land. The land officers held that the price of the land was $2.50 per acre. Sections 2264, 2265 and 2266 provide that where payment is not made for the land within the time fixed by law, which in this case was twelve months, "the tract of land so settled and improved shall be subject to the entry of any other purchaser."

So that, if appellee had not paid for the land what was demanded, he would not only not receive a certificate of entry himself, but his land and his improvements with them would be subject to the entry of any other purchaser. A tender of $1.25 per acre would have availed nothing. Under the ruling as to these lands, this would not have been the payment of the legal price, and his entry would not have been allowed. An appeal to the Commissioner

and the Secretary would have availed nothing, for these officers had already ruled that the price was $2.50 per acre. An appeal to the courts was an impossibility, because this court has held in Johnson *v.* Towsley (13 Wall., 72) and other cases, that the courts would not interfere with the executive officers in discharge of their duties, by injunction, mandamus or otherwise, while the legal title remained in the United States. Appellee had, therefore, no means of relief from this payment. He had no alternative but that of giving up his enterprise, involving the loss of the land, of his dwelling, and of the time and labor he had spent in developing the property. In other words, he was *compelled* to make the payment of the sum demanded of him by those in authority.

The record does not show that appellee filed a protest against the overcharge, and upon this absence of a protest counsel for the United States bases his claim that the payment was a voluntary payment; that both parties to the transaction mistook the law, and believed that the legal price was $2.50 per acre.

No protest, however, was necessary to preserve his right to bring suit against the Government for an overcharge, and a protest and notice of intention to bring such a suit might have had a tendency to prejudice the land officers against the entry. After an entry is allowed by the local officers, the papers in the case are sent to the Commissioner for approval, and for the issuance of a patent. The Commissioner has the right to cancel an entry, if he does not consider the evidence to be sufficient, and this right is frequently exercised. It may be that the appellee did not wish to raise any obstacles to the prompt issuance of a patent; or it may be that he realized that a protest would do no immediate good. Whatever his reasons, the absence of a protest, which was not required by law, is no proof that the appellee willingly paid $200, when the

price was but $1.25 per acre. He paid the double price because he was required to do so to preserve his rights. Other entrymen were required in the same way to pay the double price. There are now pending in the Court of Claims about seventy-five cases of the same kind where the double price was charged. In some of these cases protest was made. In others, protest was not made. The compulsion was the same in both classes of cases. The entrymen all paid because they had to, in order to obtain the right of pre-emption granted them by Congress.

The case of John Baxter, reported in Vol. 11, p. 99, of P. L. D., discloses the ground which the department assigned for charging $2.50 per acre for this land. Baxter made entry August 14, 1889, and was charged $2.50 per acre for his land, and soon afterwards applied for repayment of the excess of $1.25 per acre. The Secretary on July 25, 1890, reiterated the previous holding of the Department that the price of such lands was $2.50 per acre. He said:

"The land having been raised to double minimum prior to January, 1861, was by the terms of the act reduced to one dollar and twenty-five cents per acre; but subsequently it fell within the limits of the grant to the Northern Pacific Railroad Company, by definite location, made July 6, 1882, and by reason thereof was again raised to two dollars and fifty cents per acre."

It thus appears that since July, 1882, it had been held by the Department that the price of lands situated like the appellee's land in relation to railroad grants was $2.50 per acre, and this was the construction at the time the appellee paid for his land. Under these decisions the appellee *was required*, as the Court of Claims finds, to pay $2.50 per acre instead of $1.25 per acre.

The existence of this long-continued ruling absolved these entrymen from the obligation of filing a protest in

each case, if any obligation to file such protest can be conceived to exist in any case where an illegal charge is exacted. The facts were the same as in the Swift case, 111 U. S., 22–31, in which the court said:

"From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law, upon which it acted through its successive Commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value, instead of in money, and it regulated all its forms, modes of business, receipts, accounts and returns upon that interpretation of the law; that it refused on application, prior to 1866, and subsequently, to modify its decision: that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and, finally, that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all. This was in effect to say to appellant, that unless it complied with the exaction, it should not continue its business, for it could not continue its business without stamps and it could not purchase stamps, except upon the terms prescribed by the Commissioner of Internal Revenue. The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

"We can not hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria.* * * *

"No formal protest, made at the time, is, by statute, a condition of the present right of action, as in cases against the collector to recover back taxes illegally exacted; and

the protests spoken of in the findings of the Court of Claims as having been made prior to 1866 by manufacturers of matches and others requiring such stamps, are of no significance, except as a circumstance to show that the course of dealing prescribed by the Commissioner had been deliberately adopted, had been made known to those interested and would not be changed on further application and that, consequently, the business was transacted upon that footing because it was well known and perfectly understood that it could not be transacted upon any other. A rule of that character, deliberately adopted, and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced. This principle was recognized and acted upon in U. S. *v.* Lee, 106 U. S., 196–200, where it was held that the officers of the law, having established and acted upon a rule that payment would be received only in a particular mode, contrary to law, dispensed with the necessity of an offer to pay in any other mode, and the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary by law to secure his right."

This decision of the Supreme Court is conclusive upon this question.

Where the parties are not on equal terms, where the position of the parties is such that one party can make a demand of another party for the performance of certain duties, when the demand was unauthorized, the money paid in response to such a demand is not a voluntary payment, and the absence of a protest is no proof that the money was voluntarily paid. In the case of the Bank of the United States *v.* Bank of Washington, 6 Peters, 8, this court said :

"Where money is wrongfully and illegally exacted it is received without any legal right or authority to receive it; and the law at the very time of payment creates the obligation to refund it. A notice of inten-

tion to recover back the money does not even in such cases create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment or made through mistake."

In U. S. *v.* Lawson, 101 U.S., 164–169, the court said:

"Suppose that is so; still it is contended by the United States that the payments were voluntarily made, and that the money can not be recovered back. Confessedly the order was official and peremptory, and under such circumstances it may be inferred that the party felt that if he refused to obey, the refusal would cost him his commission. Had he refused to comply with the order or entered a protest, his act might have been regarded as contumacious, and have proved as injurious in its consequences to the incumbent of the office as if he had declined to discharge the ordinary duties of his office. Viewed in the light of the attending circumstances, and especially of the fact that the order came from the Commissioner of the Customs, to whom he was immediately responsible, we can not hold the payments were voluntary within the meaning of the judicial rule, which, in consequence of the payment, denies to the party making the same the right to recover it back."

In the similar case of U. S. *v.* Ellsworth, 101 U. S. 170, this court said, after quoting sections 3617 and 3619 R. S.:

"Viewed in the light of these penal provisions the payments in question, made under the peremptory order of the Commissioner, can not be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

In Steele *v.* Williams, 8 Wels. Hurl. & Gordon, 625, Martin, B said:

"If a statute prescribes certain fees for certain services, and a party, assuming to act under it, insists upon having more, the payment can not be said to be voluntary."

Tutt *v.* Ide, Blatch., 3, p. 249:

"The general rule is that an action for money had and received lies whenever money has been received by the defendant which in *æquo* and *bono* belongs to plaintiff."

"Where A, a common carrier, agreed with B to convey goods at a specified rate for freight, and then refused, at the place of destination, to deliver the goods except upon payment of freight at a higher rate and B in order to obtain possession of the goods paid to A the sum demanded; *Held*, that the payment was not voluntary, and that the excess beyond the agreed freight might be recovered back."

In this decision the court referred to the case of Shaw *v.* Woodcock, 7 Barn. & Cress., 73, where it was held:

"That a payment made in order to obtain possession of goods or property to which a party was entitled and of which he could not otherwise obtain possession at the time was a compulsory and not a voluntary payment and might be recovered back."

There was no mention of a protest having been made, or as being necessary, in Tutt *v.* Ide.

In Ogden *v.* Maxwell, 3 Blatch., 319, it was expressly held that a protest was not necessary.

The report says:

"This was an action against the defendant as Collector of the port of New York to recover back money paid under the following circumstances: The plaintiffs were owners of the ship *Racer*. She arrived at New York from Liverpool in November, 1851, with 709 steerage passengers and their wearing apparel and other personal baggage and tools of trade. Only one permit for the examination and landing of the baggage of all the passengers was

issued by the Collector, but he demanded pay for 154 permits, being one permit for every five passengers at the rate of twenty-five cents for each permit, being $30.80 in all. The plaintiffs paid this amount in order to obtain one permit. In each case the money was paid without any written protest being made.

"It is not necessary to the maintenance of a civil action for the recovery of money wrongfully collected that any turpitude should be proved against the officer. The suit in no way rests on any illegal purpose of the defendant in exacting the payment. It is well sustained, if his official power was exercised in the collection without warrant of law. Maxwell *v.* Griswold, 10 How., 242.

"The payment was compulsorily obtained in this instance and they are entitled to charge the collector with the amount notwithstanding he received it for and paid it to the Government. Ripley *v.* Gelston, 9 Johns. 201.

"Any charges or costs illegally exacted by an officer, *colore officii*, may be recovered back from him by the common-law action of *indebitatus assumpsit*. Clinton *v.* Strong, 9 John., 370.

"We do not think that the act of February 26, 1845, 5 U. S. 727, applies to exactions of this character. The terms of that act, requiring notice in writing to be given to the Collector of objections made to payments exacted by him, are expressly confined to duties paid. In all other respects the parties stand upon their common law rights and liabilities and under those the action in this case well lies, although the fees collected by the defendant were paid into the treasury before suit was brought."

In Clinton *v.* Strong, 9 Johns., 370, the court said:

"The payment of the costs could not be considered a voluntary act. They were exacted by the officer, *colore officii*, as a condition of the redelivery of the property. It would lead to the grossest abuse to hold a payment made under such circumstances a voluntary payment precluding the party from contesting it afterwards."

The brief for appellant, however, ignores all these principles and the inequality of the situation of the par-

ties, and the finding of the court that the payment was required by the land officers, and seeks to make out a case of payment under a mutual mistake of law, basing the argument upon the groundless assumption that the appellee paid the sum demanded of him because he believed that he ought to pay it. There is no evidence or finding whatever upon which to base this assumption. In fact it is completely negatived by the finding of the court that he was required to pay the sum demanded in pursuance of the settled ruling of the Department.

This assumption is also opposed to that principle of law which presumes that every man knows the law, and holds him responsible for that knowledge. Presuming, as we are bound to do, that appellee did know the law, it becomes more apparent still that the payment was made under compulsion, for no man, knowing that he had the right to enter a tract on payment of $1.25 per acre, would willingly pay $2.50 per acre for it, unless, as in this case, he had no choice in the matter.

But upon this baseless and wholly untenable assumption the principal portion of appellant's argument is based. With the cases cited in the brief or with the principles laid down by them we have no quarrel, as they simply serve to show by way of contrast the compulsory character of the payment in this case. In the case cited, for instance, of Corkle *v.* Maxwell (3 Blatch., 413), the case was entirely different in that the payment was not made to secure a right to which the plaintiff was entitled without such payment. The court held that the plaintiff had no legal right to have his warehouse designated as a public warehouse. That such designation was a matter of favor or discretion on the part of the Secretary, and that any payments made in fulfilment of conditions imposed by the Secretary could not be recovered. The citation is perhaps unfortunate for the

appellee for the reason that the court further expressed the opinion that—

"When a payment has been obtained by fraud, oppression or extortion, or when it has been made to secure a right which a party paying was entitled to without such payment and which right was withheld by the party receiving the payment until such payment was made, such payment was not voluntary and may be recovered back."

Brisbane *v.* Dacres is a perfect example of a voluntary payment, and of a payment made under a mistake of law. Admiral Dacres had no control over the person or property of Captain Brisbane and could exercise no legal pressure upon him to compel the payment of the sums paid. The payments were made by Brisbane in the full belief that he was obliged by law to make them, and the suit for the recovery was brought upon the ground that the payment was made in mistake of law. In this case appellee denies that he made the payment under any mistake or misapprehension of the law, and he does not bring his suit upon that ground. He had no opportunity to judge for himself what the law was, as Brisbane had, nor did he have any opportunity to defend himself in court against the demand of the law officers, in the first instance, as Brisbane had. The mistake, if it can be called a mistake, where a department misconstrues a law, and forces its misconstruction upon a citizen, was entirely the mistake of the law officers, and not the mistake of the appellee, or the mutual mistake of both parties. In the cases we have cited the courts have distinguished between payments forced by a party in control of the person or property of another, and cases of real mutual mistake of law. Where the construction of the Department has been forced upon a citizen the Supreme Court has said, in U. S. *v.* Ellsworth, above

quoted, "Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

And so with the other cases mentioned in appellant's brief. Not one of them tends to unsettle the rulings we have referred to on the question of compulsory payments, or serve to introduce a doubt as to what the law is. The case of Waples *v.* The United States, 110 U. S., 630, is entirely beside the mark. That case simply held that where a purchaser at a marshal's sale bought the title of the United States to a certain piece of property, and it subsequently turned out that the United States had no title whatever, the purchaser could not sue the United States for the recovery of the purchase money on the ground of failure of consideration. The purchaser obtained what he bought, though not what he thought he had bought. He took the risk and obtained all the title of the United States, which was all the United States undertook to sell him. While he lost by the transaction the United States was under no legal or moral obligation to save him harmless. The case plainly has no application to the case at bar.

In the case of United States *v.* Wilson, 168 U. S., 273–276, there was a lack of the element of compulsion shown in the Lawson, Ellsworth and Swift cases, and in the case at bar. There appeared in that case no ruling by the head of the Department, no demand upon the claimant by his superior officers that he should account for the fees mentioned. The fees were not paid to avoid a controversy with any department. As the court said: "This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory orders of a

superior officer; nor a payment under duress." The facts shown did not bring the case within the ruling in the Ellsworth and Lawson cases, or within the Swift case. Had the findings of the Court of Claims shown that the payments had been *required* by the officers of the Treasury in pursuance of the long-settled rulings of the Department, the ruling of the Supreme Court would doubtless have been different, since its decision was based entirely on the absence of such findings by the Court of Claims.

In the two cases of Lambourne *v.* County Commissioners (97 U. S. 181), and Railroad Co. *v.* Commissioners (98 U. S. 541) there was also a lack of the essential element of compulsion. These were both cases where illegal taxes were paid and a suit afterwards brought for recovery of the amount paid. The distinction is evident between the payment of a tax and such a payment as was made in the case at bar. An illegal tax can not be enforced, and is not a cloud upon the property. Consequently a payment of such a tax, when its payment could be resisted in the first instance, is a voluntary payment, since the tax could not have been enforced against the property. In Railroad Co. *v.* Commissioners the court said:

"The real question in this case is whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made under compulsion. The Treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. No attempt was made by the Treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him."

The decision in Elliott *v.* Swartwout, 10 Peters, 137–152, applied directly to a customs case, in which protest made at the time of the overcharge complained of has always been required by the courts and by positive statute law. The reason why a protest was considered necessary in that class of cases, when only the collector and not the Government was suable, is given by the court as follows:

"To make the collector answerable, after he had paid over the money without any intimation having been given that the duty was not legally charged, can not be sustained upon any sound principles of policy or law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim indemnity from the Government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the Government to indemnify him against the suit."

It is evident that customs cases are a class by themselves and that the reasons which make a protest absolutely necessary in such cases have no application to other cases. The questions arising in the administration of the customs laws are so delicate, with such subtle shades of difference, that it is absolutely necessary that the Treasury have notice when one of its rulings is to be disputed, in order that the evidence may be preserved. This necessity has crystallized into positive law, regulating the form and time for filing protests, and creating a separate jurisdiction for the trial of such causes, apart from other claims against the Government. So that decisions which are perfectly necessary and proper in customs cases have never been considered applicable to other classes of cases.

Counsel for appellant practically assumes that there was no exercise of power, either actual or threatened, in the case at bar; that the simple proposition was before appellee whether to buy land offered for sale at $2.50 per acre, and that he accepted the offer and purchased the land. On the first branch of this proposition it is sufficient to quote the language of this court in Maxwell *v.* Griswold, 10 How., 243, where the court said:

"Now, it can hardly be meant in this class of cases, that to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of the illegality, and without being able to regain possession of his property except by submitting to the payment."

Nor did the appellee ever bargain or contract for the land at the rate of $2.50 per acre. He made a filing on the land, made his improvements and cultivated the soil, under a law which permitted him, after performing these conditions, to buy the land by paying $1.25 per acre for the same. He entered into no contract or agreement to pay the $2.50 per acre. He did nothing but pay the $2.50 per acre because it was demanded of him, and because he had no choice, reserving all rights to bring suit in the Court of Claims for the amount of the illegal exaction. He is not seeking to re-open any closed transaction on the ground of inadequacy of consideration. The adequacy or inadequacy of consideration has nothing to do with this case. Officers of the United States have illegally exacted of appellee the sum of $200, to which the United States has no claim, and he is simply seeking to get back money that belongs to him and which the counsel for appellant now admits should never have been demanded of him. While on

this part of our subject we may as well call attention to the fact that the Department has never considered such an entry a closed transaction, where less than the legal price has been charged, and there are great numbers of cases where sums additional to the original payment have been demanded and where if the demand was not complied with the entries have been cancelled. See cases of Moses Stern, p. 1393, Vol. 2, Copp's Land Laws; Harvey J. Judd, p. 507, Vol. 6, P. L. D.; Charles P. Bedell, p. 495, Vol. 7, P. L. D.; Henry McCrea, Vol. 7, p. 578, P. L. D.

The case of Frederick W. Lawrence, Vol. 23, P. L. D. p. 450, is a case of this kind.

Lawrence made a desert-land entry in California in 1877, under the act of March 3, 1877, paying 25 cents per acre as initial payment, and receiving a certificate to the effect that upon payment of $1 per acre additional he would be entitled to receive a patent.

His entry was soon afterwards suspended, and suspension was not removed until 1891 or 1892. He made final proof and made final payment for the land January 17, 1896. In 1887 the Department changed its rulings of the ten years before and held that the legal price of such lands was $2.50 per acre, and this ruling was upheld by the Supreme Court in the case of Benj. Healey, 160 U. S., 136. On April 23, 1896, Lawrence was called on for an additional $1.25 per acre, and the Department held in the decision cited that he must pay the additional $1.25 per acre, notwithstanding that when he entered the land it was understood that he was to pay but $1.25 per acre for the land, and he held a certificate to that effect. In the Lawrence case too little was charged by the local officers, and he was compelled to pay the difference, although he had the highest equitable claim to enter the land at $1.25 per acre. We thus see that an entry is not

a final adjudication, unless actually in accordance with the law, and there is no more reason why an entryman should be concluded by the price paid, than that the Government should be.

Congress has fixed a price upon every acre of the public lands. No part of the public domain is subject to the will of the Secretary of the Interior in the matter of price. That has always been a matter fixed by law. To allow the officers of the Land Office to charge what they will, and to refuse to repay an illegal exaction, as contended for in appellant's brief, is to substitute for the will of Congress the will of the executive officers.

In the eye of the law the Secretary of the Interior has no more power to legislate upon the question of price of land than the humblest citizen; yet if the contention of appellant were to be sustained, he would in effect be given that power; for if he can fix an extra-legal price for one kind of lands, he can for all, and if the courts will not decree the return of the amounts illegally exacted, then it is the same for every practical purpose as if he had the law-making power; for his actions will have been enforced by the courts, instead of the will of Congress.

The Defense of Voluntary Payment in this Case is Exceptional and Opposed to the Entire Policy of the Government.

In the act of June 16, 1880, Congress has recognized that the Government is responsible for overcharges that may arise in the administration of the land laws, and has directed the repayment of the overcharge in cases exactly similar to this in principle.

One part of this act reads:

"In all cases where parties have paid double minimum price for land which has afterwards been found not to be

within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall be repaid to the purchaser thereof or to the heirs or assignees."

This law is applicable to mistakes of law on the part of the Government, as well as to mistakes of fact, and has been so administered.

In the case of M. F. Soto, Vol. 6, P. L. D., p. 384, repayment of the double minimum excess was directed where the double minimum had been charged on account of the Atlantic & Pacific grant from San Buenventura to San Francisco. The Department held on the 23d of March, 1886, 4 L. D., 458, that the Atlantic & Pacific Company had no grant between the said places. This was purely a question of law, and the charge of the double minimum price had been purely an erroneous construction of the law, just as in this case. Yet repayment was directed under the act of June 16, 1880. In course of the opinion Secretary Lamar used this language:

"One dollar and twenty-five cents per acre is all the Department was authorized to EXACT from them when final proof was made."

We quote this as a recognition of the fact that the Department is the authority that construes the law, and determines what the law requires to be paid for land. This power is such that Secretary Lamar denominated it an "Exaction."

Another case of payment of the $1.25 per acre, where the local officers had not observed the law, is shown in the case of Jacob A. Guilfoil, Vol. 8, p. 583.

The act of March 2, 1889, 25 Stat. 854, had reduced the price of certain lands from $2.50 to $1.25 per acre. On April 22, 1889, Guilfoil had made final proof and payment at the rate of $2.50 per acre. Secretary Noble directed the repayment of the excess of $1.25 per acre in the following language:

"It appears that this entry was made before the receipt of the instructions of your office by the local officers, but at the time payment was made for the land, the land had been reduced in price to one dollar and twenty-five cents per acre, and therefore the sum of two dollars and fifty cents per acre was erroneously charged."

Here is another instance of recognition of the fact that the price paid by the entryman is always the price fixed by the Government officers. The Government is responsible for the charge. The error of the local officers was an error of law. They had not been apprised of the reduction of price, and hence erred as to the law in demanding and receiving the $2.50 per acre. Counsel for the United States would characterize this as a case of mistake of law, without the right to repayment: yet Congress had anticipated such a case, and recognized the obligation of the Government to refund, and this obligation was carried out by the Secretary without question.

The case of Thomas Kearney, Vol. 7, p. 29, is to the same effect. Secretary Vilas there said:

"Kearney made cash entry October 14, 1885. At the time the price of the land was $1.25 per acre. He was erroneously charged $2.50 per acre, and paid $200 more than he should have paid.

"When the entry was made and double minimum price paid for the land it was not, and since the date of forfeiture had not been, within the limits of a railroad grant. It had ceased to be double minimum land and when the local officers charged $2.50 per acre they not only disregarded the terms of the letter of instructions above referred to but the following language in the act forfeiting the grant. * * * I therefore reverse your decision and direct the repayment to Thomas Kearney of the excess of one dollar and twenty-five cents per acre overpaid by him on his pre-emption cash entry No. 2377."

The error in this case was merely an error as to the law made by the local officers. There was no question at all as to the location of the land with respect to the grant.

There are many other reported cases of the same kind, and they have been followed in the administration of the law in hundreds and probably thousands of cases. The Government has recognized its responsibility in the matter of the overcharge, and has made repayment wherever it could find legal authority to do so. Money can only be taken out of the Treasury by authority of law. There was no express authority or appropriation for payment of the overcharge except where the land was outside of the grant, so that the Secretary has never been able to afford relief in cases like this. But he has always recognized that whatever price was paid was paid on account of having been fixed by the Government officials, in construing the law, and has never sought to throw the responsibility of construing the law, or of any errors that have been made upon the humble entrymen who were seeking to acquire homes on the public lands.

This fact was recognized also in the case of Frank A. White, Vol. 17, P. L. D., p. 339, in which repayment was refused on the ground that the Secretary had no legal authority to make it.

It is recognized, however, that the excessive price was erroneously charged by the Government.

The syllabus says:

"There is no authority for the repayment of double minimum excess charged erroneously required under a desert land entry of an even section within the limits of a railroad land grant."

The decision says:

"The land was within the granted limits of the Northern Pacific Railroad and the local officers required him to pay fifty cents per acre at the time of his application.

"On the 28th of November, 1891, he made final proof and completed his entry, when he was required to pay an additional sum of two dollars per acre, making $2.50 per acre. * * *

"Under the facts in the case and the Act of March 3, 1877, as amended by the Act of March 3, 1891 (26 Stat., 1095), fixing the price of desert land entries at $1.25 per acre, without regard to the situation of the land with relation to the limits of railroad grants, there is no question but that White was required to pay $400 too much for the land.

"As there is no statute in existence empowering the Secretary of the Interior to make repayment in cases of this character, your decision is affirmed."

It is interesting to note that in this case the claimant carried his case into the Court of Claims, obtained judgment there for the sum of $400 and that no appeal was taken from this judgment, and the same was paid.

We are able also to cite a case identical in every respect with that of appellee in which the Secretary of the Interior directed the return of the overcharge.

We refer to the case of Albert Nelson, Vol. 28, P. L. D., p. 248.

The syllabus of the case states:

"The repayment act of June 16, 1880, does not authorize the Secretary of the Interior to draw his warrant upon the Treasury for double minimum excess erroneously charged for lands reduced in price by section 3, act of June 15, 1880; but where the consideration received by the Government is in the form of surveyor general's scrip, and yet remains in the custody of the Department, the error may be corrected by a return of scrip equal in amount to the excess."

The decision says:

"Sept. 14, 1895, Albert Nelson commuted his homestead entry, embracing the s. w. ¼ of section 34, tp. 51 n., tr. 5 w., Ashland, Wisconsin, surrendering in payment therefor three certificates of location issued by the United States Surveyor-General for the State of Louisiana and described as follows: Respectively '332 B' for one hundred and sixty acres; '401 H,' for eighty acres, and '646 I' for eighty acres; thereby paying double minimum price for the land covered by the entry.

"Sept. 17, 1897, he filed in the local office an application for repayment of the excess. His application was transmitted to your office and upon examination of the record was denied Sept. 28, 1897. His appeal from this action of your office is now here for consideration.

"An examination of the records of your office show that the land was offered at public sale at $2.50 per acre June 22, 1859.

"The third section of the Act of June 15, 1880, provides:

"That the price of lands now subject to entry which were raised to two dollars and fifty cents per acre, and put in market prior to January, 1861, by reason of the grant of the alternate sections for railroad purposes is hereby reduced to $1.25 per acre.

"The land is within the limits of the grant to the Chicago, St. Paul, Minneapolis, and Omaha Railway Company, Bayfield branch, the map of definite location therefor having been filed July 17, 1858, and it was by reason of said grant that the land was raised to the double minimum price. It therefore falls within the description of lands affected by the said Act of June 15, 1880, and was thereby reduced to one dollar and twenty-five cents per acre. The *exaction* of a double minimum price was error. Can it be corrected?

"The application does not come within the remedy prescribed by the second section of the Act of June 16, 1880, because Nelson's entry has not been canceled, nor was it erroneously allowed, and it may be confirmed; nor has it 'been found not to be within the limits of a railroad land grant.' So that had he paid for this land in money,

and the money so paid had reached the Treasury, the said act would not authorize the Secretary to 'draw his warrant upon the Treasury for the excess so erroneously paid.' (See Inez Rhodes, 27 L. D., 47; William Edmonston, 20 L. D., 216.)

"In the case at bar, however, the consideration received by the government has not been covered into the Treasury, but is still in the hands of the officers of this Department and the matter may be adjusted independently of the statute invoked.

"Through the error of the register and receiver he has paid for this land double the amount required by law. It was wrong to exact this, and to retain it would be to continue the wrong. While the consideration remains in the hands of this Department the mistake may and should be corrected. * * *

"The certificates surrendered by the applicant as the consideration for the land are in the custody and under the control of the Department, and justice and equity demand that the mistake should be corrected.

"You will, therefore, return to the applicant certificates with proper endorsements thereon, representing an amount equal to the excess paid by him for the land."

We have quoted this case fully for the reason that it is identical in every way with the case at bar with the exception that the payment was made by surrendering Surveyor-General's certificates instead of in money. The Secretary said that it was wrong to "exact this, and to retain it would be to continue the wrong." Yet to continue the wrong is the very object of the prosecution of the appeal.

We have thus shown from decisions of this court, from inferior courts, and from the decisions and admissions of the executive department in which this class of cases originated, that the money was overcharged the appellee, and that the repayment of overcharge is due; that to continue to retain it would be to continue the wrong of the original exaction. The payment was in no degree vol-

untary, but was compulsory, in every sense of the word, and there can be no doubt that the appellee is entitled to judgment for the money overcharged.

The Question of Jurisdiction.

One portion of appellant's brief deals with the jurisdictions of the Court of Claims and asserts that that court has no jurisdiction in implied contracts, where a promise to pay is implied by law. In reply we have only to say that the jurisdiction of the court has been uniformly recognized in this class of cases by the Court of Claims and by this court. A notable case is that of United States *v.* State National Bank, 6 Otto, 30–36, where the court said, according to the syllabus:

"Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property can not be held by the United States against the claim of the wronged and injured party."

In the opinion the court said:

"In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved."

The meaning of implied contracts was well known to those who drafted the jurisdictional act, and they must be taken to have meant what was then and still is generally meant by that phrase.

The fact that some authors now designate a certain class of implied contracts by the phrase *quasi contracts* can not take away from the well-settled jurisdiction of the Court of Claims. In fact it would be curious to hold that the Court of Claims had no jurisdiction in this class of cases. Suppose that an entryman pay for certain lands

and it is found that the Government has already parted with its title and the entry fails. Under the contention of counsel in this brief, in the absence of some such act as the Act of June 16, 1880, the entryman would have no remedy for the purchase money in the Court of Claims. The claim would simply be an equitable or moral one, which Congress had withheld from the jurisdiction of the court.

We think it is unnecessary to further answer the brief of appellant upon this point for the reason that his contention is plainly opposed to the decisions of this court ever since the act of 1887 became a law, in assuming jurisdiction and affirming judgments rendered under authority of the phrase to which he refers.

We may say, however, that this claim is not only founded upon an implied contract to repay the overcharge, but it is also founded upon a law of Congress, the Act of June 15, 1880. Under that act the appellee was authorized to obtain title to this land upon payment of $1.25 per acre. His rights under that law were taken away from him by officers of the Government, though not by Congress or the Government itself, and it is to enforce his rights under that law that this suit is brought. The right is founded upon that law, just as in the case of Tutt *v.* Ide, 3 Blatch., 249, to which we have referred, the claim was based primarily upon the contract. The only way to enforce appellee's right to make entry at $1.25 per acre, given him by that law, is this suit in the Court of Claims. We, therefore, think it plain that not only did the court below have jurisdiction of this action, as an implied contract for the repayment of this money, but as of a claim founded upon a law of Congress.

The jurisdiction of the Court of Claims covers all claims against the United States arising *ex contractu* or founded on any law of Congress.

On page 2 of the brief for the Government Section 3 of chapter 227 of the laws of 1880 (21 Stat., p. 238) is quoted. This statute established the price of certain agricultural public lands which were reserved to the United States within grants to railroads and the price of which by reason of such grant was raised to $2.50 per acre prior to January, 1861, and which were not sold June 15, 1880, at $1.25 per acre. These lands were surveyed, located, and identified by maps in the Land Office, so that the Secretary of the Interior, Commissioner of the General Land Office and the Registers and Receivers at the local land offices had perfect knowledge as to the fact that the price thereof fixed by law was $1.25 per acre and not $2.50 per acre. These lands could not be sold for $2.50 per acre, unless all these officers ordained such sales in plain violation of law. Such sales were ordered and made in the State of Wisconsin by the exaction of all these officers in violation of law and an aggregate sum of $12,000 in excess of the price fixed by law was extorted from persons entitled to purchase the lands at $1.25 per acre. As is well known, the Secretary of the Interior at a later date admitted these charges of $2.50 per acre to have been erroneously made and that the excess whenever the Secretary of the Interior had power to do so should be returned (see case of Albert Nelson, 28 P. L. D., p. 248). But it was also held that the act of June 16, 1880, did not authorize the Secretary of the Interior to draw his warrant on the Treasury in repayment of such cases. In one of these cases, that of Partelow Miles, in which the Court of Claims entered a judgment for the excess of $100, it appeared that at first only $1.25 per acre was exacted, which was paid. Afterwards from Washington the local land officers were ordered to exact of him another $1.25 per acre.

This demand was enforced in spite of his earnest protests. Thus the fact is publicly known that all these payments of the excess of $1.25 per acre were exacted from Washington. Each purchaser had the alternative presented to him of compliance with this demand or suffer a loss of the house he had built and the improvements he had made and of the home he had secured under the laws of the United States. On the part of the sufferer, any controversy or dispute with the officers he had to deal with but endangered the loss of his property, for they had the power to deny or cancel the entry he had made and give his home to another.

The statute of June 15, 1880, is an unconditional contract made by Congress with each citizen entitled to enter the described lands that he should have a patent for the land upon payment of $1.25 per acre therefor, and by force of this contract every dollar exacted and received of that citizen in excess of that price does not belong to the Government of the United States at all, but, on the contrary, it is a trust fund belonging to the citizen of whom it was wrongfully exacted and received. It is the law and not the officers of the Land Office that gives titles to public lands and that gives title to the United States to the purchase money received for such lands. These officers can not repeal, change or override these laws. If they attempt to do this, the courts having jurisdiction will enforce these laws. It is absurd to deny that the courts have jurisdiction for that purpose in all such cases. These officers can not sell the title to public lands for less or more than the price at which Congress has ordered such titles to be sold. A citizen who under the laws enters public lands by settlement and improvement for a home in order to subsequently purchase the same has but one remedy if the all-powerful officers who have supervision of such sales exact a price greater than that fixed by law.

That remedy is to pay the price demanded and recover the amount of the unlawful charge in the courts. In this connection the fact ought to be noted that by reason of having custody of all maps and records, and being charged with the duty of faithfully executing the laws, the applicant purchaser would be easily imposed upon and defrauded if the officer asserted the price of lands to be $2.50 per acre when in fact the law made the price $1.25 per acre. As to these cases the fact is patent that such representations were made and upon such representations the excess charged was secured.

In this case the alternative by the officers of the land office was presented to the appellee—to pay the $2.50 per acre for the land, the price of which was fixed by law at $1.25 per acre, or abandon his house and home. How can this be erected into a voluntary payment of money, in excess of the price fixed by law, so as to give the Government of the United States title to the money unlawfully charged? This claim arises *ex contractu* and is also founded on a law of Congress.

We have shown, therefore, 1. That appellee was required to pay $2.50 per acre by the officers of the Land Office, instead of $1.25 per acre which is now admitted to have been the legal price.

2. That this payment was made under compulsion in order to save, not only his right to the land under the pre-emption law, but the buildings and improvements he had put upon the land.

3. That the decisions of this court and of inferior courts are to the effect that a payment made under such circumstances is made under compulsion, and that a protest is not necessary.

4. That the Department of the Interior has held in its published decisions that such overcharges, when made, are exactions or charges made by its officers, and that

where erroneous they should be repaid; and that it has repaid such overcharges where it has found legal authority to draw its warrant on the treasury for this purpose.

5. That the Department in the Nelson case caused to be repaid the overcharge in a case exactly similar to this where it found itself possessed of the authority to do so.

6. That the Court of Claims has undoubtedly jurisdiction to render the judgment in this case.

It is submitted, therefore, that the judgment of the Court of Claims in favor of the appellee was correct and that it should be affirmed by the Court.

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Attorneys for Appellee.



29466

Supreme Court of the United States.

No. 353.—October Term, 1900.

The United States, Appellant,
vs.
William Edmonston.
} Appeal from the Court of Claims.

[May 13, 1901.]

This is an appeal from a judgment of the Court of Claims in favor of the appellee and against the United States for $200, being the amount he was overcharged in the purchase of a quarter section of land. The evidence disclosed the following facts: The claimant on March 11, 1891, filed in the local land office at Ashland, Wis., a statement, under the pre-emption laws, of his intention to pre-empt a tract of 160 acres. On September 16, 1891, he gave public notice, as required by law, of his purpose to make final proof, and, in pursuance of such notice, on November, 9, 1891, proved up before the register and receiver of the land office the necessary settlement and improvement.

Findings 2, 3, 4 and 5 are as follows:

"II. The claimant having established his right to the said land, on November 11, 1891, was required to pay for the same to the United States the sum of $400, being at the rate of $2.50 per acre for 160 acres, and he did pay the United States that amount for the land.

"III. The land inhabited and improved by the claimant, and paid for by him on the 11th of November, 1891, had been raised in price to $2.50 per acre, and put in the market prior to January, 1861, by reason of the grant of alternate sections to aid in the construction of railroads, and was of an alternate section reserved to the United States along the line of a railroad within the limits granted to the State of Wisconsin by the act approved June 3, 1856, (11 Stat. 20,) to aid in the construction of railroads in that State, now known as the grant to the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and it was never alternate reserved land to the United States along the line of railroads within the limits granted by any other act of Congress to any other railway company.

"IV. At the time said cash entry was made and said money paid to the receiver at the local land office at Ashland, Wisconsin, it does not appear that the claimant made any protest or objection to said payment, nor assert any right to purchase the land at a less price than that which he was called upon to pay for said land.

"V. Said land had been raised to $2.50 per acre and put on the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, said land having been thus offered on June 14, 1856."

It also appears that the claimant applied to the land office for the repayment of half of the purchase money, which was refused.

Mr. Justice BREWER delivered the opinion of the Court.

On June 16, 1880, an act was passed, (21 Stat. 287,) in section 2 of which is the following clause:

"And in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall, in like manner, be repaid to the purchaser thereof, or to his heirs or assigns."

Another act passed the day before, June 15, 1880, (21 Stat. 237,) contained this provision:

"The price of lands now subject to entry which were raised to two dollars and fifty cents per acre and put in market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre."

Medbury v. *United States*, (173 U. S. 492,) arose under the clause first quoted, and it was held that it did not apply to lands which were in fact within the limits of a land grant, but which had been forfeited on account of the failure of the railroad company to build its road, but only to cases in which there had been a mistake in the first instance as to the location of the land, the court saying (p. 500):

"That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.

"Here no mistake whatever has been made. The lands were within the limits of the land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress."

The act of June 16, 1880, may, therefore, be put out of consideration. By the act of June 15, however, the price of this tract was reduced from $2.50 to $1.25 per acre. The claimant paid the $2.50 without protest or question. He paid more than the law required him to pay. Can he recover the excess in this action in the Court of Claims?

The question thus presented is one of difficulty. If the parties to the transaction were both private individuals, it would clearly be a case of voluntary payment, and the amount overpaid would not be recoverable. If, for instance, the owner of a large body of land placed certain prices on different tracts thereof, and his agent, dealing with a purchaser of one of those tracts, charged him more than the price fixed by the principal, the purchaser paying the extra price without protest, and the principal

accepting such payment, the transaction would not thereafter be open to inquiry in the courts, and the purchaser could not recover the extra sum which he had paid to the agent. But it is insisted that the relations between the government and its purchaser are not like those between two individuals—that there is a constraining power in the government, a species of force or compulsion in its action, which makes the payment of money by one purchasing land from it through its officers a payment not voluntary but an exaction, and therefore enables the purchaser to recover any excess in the price.

We may not enter into any discussion of the mere equities of this transaction or the extent of the moral obligation resting on the government to repay a purchaser an excess in the price charged to and received from him. Our inquiry is limited to the question whether, in the statutes conferring jurisdiction on the Court of Claims, Congress has intended to acknowledge the liability of the government to every individual who has paid to any one of its officers a sum in excess of the legal charge for property or services and given to that court the power to render judgment against it for such excess.

The consequences of such a conclusion are far-reaching. The administrative affairs of the government are carried on by many thousands of officers. The fees for their services are generally prescribed. The sums which are to be paid for property obtained from the government are in like manner fixed by statute. Can it be that every individual who pays for services rendered by any of the administrative officers of the government, or for property which he obtains through the action of such officers, may come into the Court of Claims, and have an inquiry whether he has paid more than the statutory fee or price, and if he has, obtain judgment for the excess? Suppose, for instance, the statutory fee for a certificate from a certain official is twenty-five cents, and a party applying for such certificate is charged and pays fifty cents, has Congress by its legislation in respect to the Court of Claims provided that he can go into that court and recover from the government the extra twenty-five cents? It may be said that this is an extreme case, and that the fee is for the personal services of the officer; but under the present provisions of the statutes, generally speaking, all fees for the services of officers belong to the government, and are available only in payment so far as they go of their salaries. It may also be said that no one would go to the trouble of suing for such a trifle as twenty-five cents, but if there are 10,000 cases of that kind the aggregate is no inconsiderable sum. But whether the aggregate of these claims be large or small, the inquiry is fairly presented whether Congress by its legislation intended to commit to the courts a supervision of all the charges for services and all the prices for property which administrative officers collect and receive, and empowered them to

render judgment against the government in every case of excess therein. Of course, if such was its purpose the courts cannot decline jurisdiction, and must act in compliance therewith. But before so holding it seems to us that that purpose should be clearly manifested, and that a doubt in respect thereto should be resolved in favor of the government.

By 24 Stat. 505, jurisdiction is given to the Court of Claims over actions against the United States for—

"All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort."

One contention is that there is an implied contract by the government to return to the payor any sum in excess of that which is legally due as the price of property, although the payment was made without any question, protest or notice.

No one can read the findings without recognizing that the transaction between the officials of the land office and the claimant was at the time acceptable to both and without any complaint on the part of the petitioner. Some stress is placed by counsel on the word "required" in the second finding, but we think that it means simply that the government officials charged him four hundred dollars. To that charge he made no objection. Take any case in which application is made to an official for services or for the purchase of property; when he names the fee or the price the applicant ordinarily without question pays it. In a certain sense the applicant is required to pay; that is, the sum which he pays is the sum demanded of him. It may be a rightful or a wrongful demand. When it is demanded it is required. If he pays without objection, notice or protest it is simply in response to the call upon him for the particular sum, and, as we have heretofore said, between individuals it would be regarded as a voluntary payment.

Our attention has been called by counsel to certain opinions of this court, and some expressions therein, disconnected from the facts, doubtless lend countenance to their contention. Those cases may be placed in two classes: First, those in which something was purchased from the government which the purchaser wanted or must have; and, second, those in which some official of the government was called upon to return moneys he had received by virtue of his office. *Swift Company* v. *United States*, (111 U. S. 22,) is an illustration of the first class. In that case the Swift Company sued to recover certain commissions alleged to be due on the purchase of proprietary stamps under the internal revenue law. It appeared that the company had settled with the internal revenue department from time to time, and it was held that such settlements did not bar it from its

right to recover, although in making the settlements in controversy there was at the times thereof no distinct objection, notice or protest. It was contended by the government that the matter was closed by the voluntary action of the parties, but this court decided otherwise, predicating its decision upon the fact that there had been long-continued rulings of the department in respect to the basis of settlement, and that among those who had theretofore made frequent protests was William H. Swift, who upon the organization of the claimant company became one of its large stockholders and treasurer. It was held that the company was not compelled—in view of these repeated rulings, and after protests made by others engaged in the same business, including among the number one who was largely identified in interest with itself—to continue those protests at each settlement. In other words, the thought was that there was no magic in the mere formality of an objection at the time of each settlement; that when it appeared that parties engaged in like business had presented the question to the department and frequently protested against its rulings, and that among them was one who was largely instrumental in the organization of the company, one of its large stockholders and its treasurer, it was a work of supererogation to every time repeat the formal protest. But the very line of argument pursued by the court implied the fact that there must have been some action by the party paying, or those connected with it in business; that the attention of the department had been called to the matter again and again, its action protested against, and still it insisted upon the ruling which it had made. The claimant in the case was held to be so far identified with the parties who had made protests as to be entitled to avail itself of the benefit of such protests. The language found in the opinion as to the difference in the position occupied by the government and a party dealing with it must be understood in connection with those facts. If taken otherwise, and in the broad sense which counsel desire, and as carrying with it the suggestion that there can be no voluntary payment in a dealing between the government and an individual in respect to the purchase of property from the government, we must decline to accede to it.

We quote from the opinion in that case, pages 27 and following, that which shows the facts as understood by the court, and the language upon which the contention is here made:

"It appears that prior to June 30, 1866, the leading manufacturers of matches, among whom was William A. Swift, who, upon the organization of the claimant corporation in 1870, became one of its largest stockholders and treasurer, made repeated protests to the officers of the Internal Revenue Bureau against its method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs; although it did not appear that any one in behalf of the claimant corporation ever, after its organization, made any such protest or objection, or any claim on account thereof, until January 8, 1879. On that date the appellant caused

a letter to be written to the commissioner, asserting its claim for the amount, afterwards sued for, as due on account of commissions on stamps purchased. To this, on January 16, 1879, the commissioner replied, saying that the appellant had received all commissions upon stamps to which it was entitled, 'provided the method of computing commissions, which was inaugurated with the first issue of private die proprietary stamps and has been continued by each of my predecessors, is correct. I have heretofore decided to adhere to the long established practice of the office in this regard until there shall be some legislation or a judicial decision to change it.' And the claim was, therefore, rejected.

"From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law, upon which it acted through its successive commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value, instead of in money; that it regulated all its forms, modes of business, receipts, accounts and returns upon that interpretation of the law; that it refused on application, prior to 1866 and subsequently, to modify its decision; that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and, finally, that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all. This was in effect to say to appellant that unless it complied with the exaction it should not continue its business; for it could not continue its business without stamps and it could not purchase stamps except upon the terms prescribed by the Commissioner of Internal Revenue. The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

"We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria.*"

United States v. *Lee*, (106 U. S. 196,) is not in point. The question there was as to the necessity of a tender on the day of sale in order to prevent the issue of a valid tax deed. The property was the Arlington estate, title to which was at the time in Mrs. Lee, and in respect thereto it was said (p. 204):

"It is proper to observe that there was evidence, uncontradicted, to show that Fendall appeared before the commissioners in due time and on the part of Mrs. Lee, in whom the title then was, offered to pay the taxes, interest and costs, and was told that the commissioners could receive the money from no one but the owner of the land in person."

It also appeared that the commissioners had laid down a rule to the same effect, and the court held, under those circumstances, that no further tender was necessary, quoting the general rule laid down in *Hills* v. *Exchange Bank*, (105 U. S. 319,) as follows (p. 202):

"It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."

Of course, this decision bears only remotely on what is or what is not a voluntary payment, and not at all upon the question whether there be any right of recovery in case of a voluntary payment.

The *Bank of the United States* v. *The Bank of Washington*, (6 Pet. 8,) is even less in point. There it appeared that a judgment had been rendered against the Bank of Washington; that it sued out a writ of error, and ultimately obtained a reversal of the judgment; but that before it sued out such writ of error, and while the judgment was in full force, it paid the amount thereof to one having in his possession an execution, notifying him at the same time that it intended to take proceedings to reverse the judgment. It was held that notwithstanding such notice no recovery could be had by the Bank of Washington from the party who had the execution, he holding not as owner of the judgment but simply as agent to collect; that while upon reversal a recovery might be had from the judgment creditor, a payment to this third party created no cause of action against the party so receiving.

On the other hand, in *Lamborn* v. *County Commissioners*, (97 U. S. 181,) Lamborn, trustee for a land company, whose lands had been sold for taxes to the county of Dickinson, paid the amount of taxes to the county and took an assignment of the tax sale certificates. It was subsequently decided that the taxes were illegal, and thereupon he brought this action to recover the amount he had paid. When he made the payment and took the assignment he made no protest, and it was held that he could not recover, the payment having been voluntary, and made simply under a mistake of law. Many cases are cited in the opinion sustaining that proposition. To the same effect is *Railroad Company* v. *Commissioners*, (98 U. S. 541.)

The other class of cases is illustrated by *United States* v. *Lawson*, (101 U. S. 164,) and *United States* v. *Ellsworth*, (Id. 170.) In each of those cases it appeared that a collector had received certain fees, some of which he was entitled to retain, but all of which he paid into the United States Treasury upon the peremptory order of the Commissioner of Customs. This was held not to be a voluntary payment or sufficient to prevent a recovery of the moneys actually due him, the court saying, in the second of these cases (p. 173):

"You will bear in mind, said the commissioner, that all moneys of every description, not received by warrant on the Treasury, must be actually deposited. Had he added, if you fail to comply, the law will be enforced, his meaning could not be misunderstood, as the act of Congress provides that the gross amount of all moneys received from whatever source for the use of the United States, with an exception immaterial in this case, shall

be paid by the officer or agent receiving the same into the Treasury at as early a day as practicable, without any abatement, &c. (Rev. Stat. s. 3617.)

"Penalties are prescribed for noncompliance with that requirement, as follows: Every officer or agent who neglects or refuses to comply with that provision shall be removed from office and to forfeit any part or share of the moneys withheld, to which he might otherwise be entitled. (14 Stat. 187; Rev. Stat. s. 3619.)

"Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain."

On the other hand, in *United States* v. *Wilson*, (168 U. S. 273,) it appeared that a consul for the United States, in his regular accounts and settlements with the Secretary of the Treasury, charged himself with certain fees, received by him as consul, which he was not obliged to account for, and paid the same into the Treasury, retiring from office upon a final settlement without making any claim or protest concerning them, and it was held that he could not recover them, as they were voluntarily paid into the Treasury, the court saying (p. 276):

"There is no pretense that he paid the fees into the Treasury to avoid a controversy with any department of the government, or that he ever made any objection or protest against the fees being charged to him as official fees. The Court of Claims so find in substance. If a voluntary payment can be made to the government, it seems to us that this is such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official to the government, we think the payments made by the original claimant were voluntary. This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as a disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the government without claim of any right to retain one penny of it."

It is clear from these references that this court has distinctly and constantly recognized the doctrine that where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered, and also that that doctrine applies to cases in which one of the parties is the government, and that money thus voluntarily paid to the government cannot be recovered.

We now proceed to notice some special objections of counsel for the appellee. One is that the defense of voluntary payment made in this case is exceptional and opposed to the entire policy of the government. Yet confessedly in all customs cases protest is necessary—made so by express statute. Counsel refer to *Elliott* v. *Swartwout*, (10 Pet. 137, 153,) in which a reason for the necessity of protest was given as follows:

"To make the collector answerable, after he had paid over the money without any intimation having been given that the duty was not legally charged, cannot be sustained upon any sound principles of policy or of law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against the suit."

And upon that say:

"It is evident that customs cases are a class by themselves, and that the reasons which make a protest absolutely necessary in such cases have no application to other cases. The questions arising in the administration of the customs laws are so delicate, with such subtle shades of difference, that it is absolutely necessary that the Treasury have notice when one of its rulings is to be disputed, in order that the evidence may be preserved. This necessity has crystallized into positive law, regulating the form and time for filing protests, and creating a separate jurisdiction for the trial of such causes apart from other claims against the government."

But *Elliott* v. *Swartwout* was decided before there was a Court of Claims, and the specific reason stated in the quotation would not apply to an action brought directly against the government in such court, and yet the necessity of protest is still affirmed by statute. So it cannot be said that the defense of voluntary payment is opposed to the entire policy of the government.

Passing from customs cases counsel refer to several instances in which the Interior Department has repaid money received under a mistake. Thus, in *M. F. Soto*, (6 Pub. Land Dec. 384,) Secretary Lamar ordered, in respect to a series of cases, a return of the excess of moneys charged and received by the local land officers and paid into the Treasury of the United States. An examination of that decision shows that it was made under the act of June 16, 1880, heretofore referred to, which, in section 2, directed the repayment, and, in section 3, provided that—

"The Secretary of the Interior is authorized to make the payments herein provided for, out of any money in the Treasury not otherwise appropriated."

So, Congress having directed a repayment under conditions named in the statute, and authorized the Secretary of the Interior to make that repayment, the Secretary simply enforced the mandate of Congress.

In re Thomas Kearney, (7 Pub. Land Dec. 29,) is to the same effect. It may be that the Secretary of the Interior misconstrued the law of June 16, 1880, as seems probable from our decision in *Medbury* v. *United States*, *supra*, but whether he did or no, his action was based upon that law. The same may be said of the case of *Jacob A. Gilford*, (8 Pub. Land Dec. 583.)

In re Frank A. White, (17 Pub. Land Dec. 339,) a case of desert land entry, is a decision that no repayment can be ordered in the absence of an express direction by Congress.

The case of *Albert Nelson,* (28 Pub. Land Dec. 248,) referred to by counsel, is significant. In that case it was held that the repayment provisions of the act of June 16, 1880, did not authorize the Secretary of the Interior to draw his warrant upon the Treasury for double minimum excess erroneously charged for lands reduced in price by section 3 of the act of June 15, 1880, but that where the consideration received for the lands was in the form of scrip, still in the custody of the Land Department, the error might be corrected by that department by a return of scrip equal in amount to the excess. That means simply that when a sale has not been closed by the payment of the consideration into the Treasury of the United States, and while the transaction is in process of administration and the consideration is still in the hands of the department charged with the duty of making the sale, it can correct a mistake in the amount of the consideration received, and that it is not necessary to turn the entire amount into the Treasury and leave the party to some other remedy directly against the government. But it does not follow therefrom that when the consideration has been paid into the Treasury and the power of the Secretary of the Interior to make any correction has ceased, a claimant may ignore the question of a voluntary payment, and maintain an action to recover the excess.

The conclusion we draw from these cases (and no others in respect to the ruling of the land department are referred to) is different from that drawn by counsel. That Congress has power in all cases to waive the question of voluntary payment and provide that any mistake shall be corrected and any excess of payment refunded by the officer receiving it, or recovered by an action in the Court of Claims, is undoubted; that, as shown by these references, it has made provision in certain cases for a refunding by the department which has received the money is obvious; and provided for such refunding irrespective of the question of voluntary payment. Now, counsel would draw the inference that the question of voluntary payment has been waived by Congress in all cases of transactions between the government through its administrative officers and private individuals except in customs cases, and that if there be no specific provision for refunding by the department in which the mistake has occurred, the party may come into the Court of Claims and enforce his right to recover. Our conclusion is directly to the contrary, and that Congress, recognizing the rule of voluntary payment, believed that in certain instances it ought not to be enforced, and that the department which received money in excess of the legal charge or price should refund, and so legislated, intending to leave all other cases subject to express statu-

tory requirement of protest or to the ordinary and well-established rule as to the effect of voluntary payment.

While the consequences of a construction are not conclusive, yet sometimes they are worthy of notice. If the jurisdiction of the Court of Claims is limited to cases in which the several departments have failed to recognize the direct mandates of Congress in respect to refunding, comparatively few cases will be brought into that court. It is to be assumed that the departmental officers will recognize all legislation of Congress, and carry it into effect in accordance with its terms, and, therefore, the only matters for judicial cognizance will be questions arising as to alleged misconstruction by such officers of its command, and the only judgments rendered against the government will be those in affirmance thereof; whereas, if the other construction is accepted, then, irrespective of any ruling by the department, without any mandate from Congress to refund, upon the mere fact of a supposed mistake in the fees charged or the price collected, although such fees or price were paid without question, the court will have jurisdiction of all actions to recover any alleged excess, and will be flooded with a multitude thereof. We know that even now that court is loaded with a volume of cases, prophetic of long delay, and if the door is to be opened so that all charges made by the government, through its officers, for fees or prices, irrespective of the question of voluntary payment, may be litigated therein, it is obvious that its docket will be so burdened that determination within ordinary limits of time cannot be expected.

Finally, we pass to a consideration of the question whether there is anything in the record to show that which is tantamount to objection and protest. We have not pursued the order of argument followed by counsel in their brief, but that which seems to us most natural to develop the questions involved herein. As indicated in the opinion in *Swift Co.* v. *United States, supra*, there are cases in which the formality of a protest or objection is unnecessary; some things may be taken as equivalent thereto or as sufficient in lieu thereof.

But we fail to see anything in the record which brings this case within the scope of that decision. It does not appear that there was any continued or even a single ruling of the land department to the effect that land situated as was this was subject to the price of $2.50 per acre, and, of course, if there had been no ruling to that effect there had been no objection or protest by any one. Nor is there anything to show that the $2.50 was paid on any supposition that it was an excessive charge, or paid simply for the purpose of protecting a property right which he had acquired. It is said that as he had already gone upon the land and made improvements, that he paid $400 to protect his right to his settlement and improvements, and that he paid it because such price was exacted from him; but there is nothing in the record to indicate that he did not go upon the

land in the first instance supposing that the price was $400, or that he did not file his declaratory statement, make his settlement and improvements—all with the expectation of paying the sum which he did thereafter pay. Under those circumstances it cannot be said that he paid a sum which was exacted from him—not because he believed it was the proper charge, but because he felt that it was necessary to protect his rights. In short, and to sum it up in a word, so far as we can see from this record the transaction was purely voluntary on his part, and that while there was a mistake it was mutual and one of law—a mistake on his part not induced by any attempt to deceive or misrepresentation by the government officials. It is a case of a voluntary payment, and as such the claimant's remedy is by appeal to the discretion of Congress and not by an action in the Court of Claims. The judgment is reversed, and the case remanded with instructions to enter judgment for the government.

True copy.

Test:

Clerk Supreme Court, U. S.